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Supreme Court, U.S.
FILED

No. 97 1290 FEB 6 1998

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In The

Supreme Court of the United States

October Term, 1997

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MIGUEL VELEZ,

Petitioner,

vs.

RICHARD L. STALDER, Warden
Wade Correctional Center,

Respondent.

◆

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

◆

PETITION FOR WRIT OF CERTIORARI

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157 pp

QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals, as well as the Western District of Louisiana, erroneously denied Miguel Velez a certificate of probable cause after he made a substantial showing of the denial of his constitutional rights to equal protection and a fair and impartial jury since he showed:

a. that the issue regarding the State's improper use of peremptory challenges to exclude fifteen of seventeen black venire persons who were death qualified by the trial court was debatable among reasonable jurists, was deserving of further proceedings and could be resolved differently by another court, where the prosecutor indicated that she believed that blacks as a group are generally opposed to the death penalty; and

b. that the issue regarding coerced jurors was debatable among reasonable jurists since no court has ever determined whether the jurors were being coerced by an internal or external source, that the jury coercion issue was deserving of further proceedings, and that the jury coercion issue could be resolved in a different manner by a court granting a limited evidentiary hearing.

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STATEMENT OF JURISDICTION

The district court for the Western District of Louisiana denied Velez a certificate of appealability on January 2, 1997. The Fifth Circuit Court of Appeals also entered an order denying Velez a certificate of probable cause to review the district court's denial of Velez's petition for writ of habeas corpus on September 15, 1997. Thereafter, Justice Scalia granted Velez an extension of time to file his petition for writ of certiorari. The letter, granting an extension of time to and including February 9, 1998, is dated December 2, 1997.

This Court has jurisdiction to review the order denying Velez a certificate of probable cause pursuant to 28 U.S.C. § 1651(a); *House v. Mayo*, 324 U.S. 42, 65 S. Ct. 517, 89 L. Ed. 739 (1945); and *Davis v. Jacobs*, 454 U.S. 911, 102 S. Ct. 417, 70 L. Ed. 2d 226 (1981). *See also, Lozada v. Deeds*, 498 U.S. 430, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991) and *Smith v. Digmon*, 434 U.S. 332, 98 S. Ct. 597, 54 L. Ed. 2d 582 (1978) (where this Court granted writs of certiorari and reversed the denials of a certificate of probable cause to petitioners.)

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PERTINENT STATUTES AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,. . . .

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In 1994, 28 U.S.C. § 2253 provided in pertinent part:

. . .

> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

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STATEMENT OF THE CASE

A. Material Facts

The petitioner herein, Miguel Velez (Velez), is a person in custody pursuant to a judgment of a court of the State of Louisiana. In 1987, a jury convicted Velez in the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana, of the first degree murder of, drug trafficker turned government informant, Barry Seal. The trial court sentenced Velez to life imprisonment without parole. Velez is currently incarcerated and has been transferred to the Louisiana State Prison in Angola, Louisiana.

Velez appealed his conviction to the Louisiana Third Circuit Court of Appeal and thoroughly briefed the issues raised in his petition for writ of habeas corpus. The issues raised in the State appeal included: (1) the issue pertaining to the State's exclusion of black venire persons through its use of peremptory challenges so as to deprive Velez of his constitutional right to equal protection pursuant to the Fourteenth Amendment; and (2) the issue regarding coercion of at least two jurors which implicated Velez's Sixth Amendment right to a fair and impartial jury. The Third Circuit Court of Appeal affirmed the conviction holding that the trial court properly overruled Velez's objections to the exclusion of black venire persons because there was an absence of a prima facie showing of discrimination and that the trial court did not abuse its discretion in refusing to allow the jury to be repolled or to conduct an evidentiary hearing to determine who or what had coerced the jurors who had sent a note indicating that they had been coerced. *See, State v. Velez,* 588 So.2d 116 (La. 3d Cir. 1991).

Subsequently, Velez applied for a writ of review to the Louisiana Supreme Court. The writ was denied. *State v. Velez,* 592 So.2d 408 (La. 1992). Thereafter, Velez applied to this Court during the 1991 October Term for a writ of certiorari raising the Fourteenth Amendment issue pertaining to the exclusion of black venire persons. The application was denied. *Quintero-Cruz v. Louisiana,* 505 U.S. 1220, 112 S. Ct. 3031, 120 L. Ed. 2d 901 (1992).

On January 20, 1994, Velez filed a Petition For Writ Of Habeas Corpus and a Memorandum in Support of Petition For Writ of Habeas Corpus, in the Western District of Louisiana, Lafayette Division. Both, the Petition and the Memorandum set out the Fourteenth Amendment issue pertaining to the State's exclusion of black venire persons, through the use of its peremptory challenges, and the Sixth Amendment issue pertaining to a jury note which indicated that two jurors had been coerced into rendering guilty verdicts. The district court ordered the respondent to file an Answer on August 31, 1994. Thereafter, Velez filed a Reply Memorandum on November 7, 1994. The district court then ordered Velez to brief the "exhaustion issue" raised by the district attorney's office and Velez did so. The district court was concerned with whether Velez satisfied the exhaustion requirement regarding the constitutional right to a fair and impartial jury. Velez's Petition for Writ of Habeas Corpus raised his constitutional right to a fair and impartial jury as implicated by two jury notes that were sent to the trial court. The first jury note indicated that two jurors had been coerced into rendering guilty verdicts for first degree murder. The note provided:

> Your Honor,
>
> I made a decision of 2nd degree murder but was told it had to be 1st degree murder because of money involved. What can I do? I feel I was coerced. I'm having a hard time living with 1st degree. Please tell me something.
>
> W. Hartnell
>
> And I'm not the only one.

> I, Edna Shaw, feel I was coerced in making a decision of 1st degree murder that I can not live with.
>
> Edna Shaw

A second jury note, by two other jurors, requested a private meeting with the judge. The district court eventually held that the issue raised by the second jury note had not been exhausted; so, Velez voluntarily dropped the issue and requested that the trial court proceed on the basis of the first jury note and the Sixth Amendment, as well as the *Batson* issue and the constitutional rights implicated thereby.

Subsequently, the district court joined Velez's Petition for Writ of Habeas Corpus with that of his co-defendant, Luis Carlos Quintero-Cruz, and scheduled an evidentiary hearing on the *Batson* issue regarding the State's use of its peremptory challenges to exclude black venire persons. An evidentiary hearing was held on July 12, 1995.

Assistant district attorney, Premila Burns, Velez's prosecutor at trial, testified. The prosecutor admitted that she believed most blacks called for jury service are opposed to the death penalty. Despite the prosecutor's belief, the fifteen venire persons she excused through her use of peremptory challenges had already been death qualified by the trial court. Additionally, the prosecutor admitted using the term "nigger", but the district court refused to allow any further exploration as to the prosecutor's prejudice. The prosecutor's testimony revealed that her reason for excusing the fifteen black venire persons was noted after the trial, during preparation for the appellate oral argument. The most frequently cited reason for excusing black venire persons was their "weak" position regarding the death penalty.[1] The trial transcripts and the prosecutor's testimony during the evidentiary hearing revealed that Ms. Burns excused ten consecutive black venire persons before accepting one. The prosecutor then excused five more consecutive black venire persons. The twelve-person jury sworn included only one black. Although defense counsel lodged contemporaneous objections to the prosecutor's use of peremptory challenges, the trial court overruled the objections because Velez was hispanic, not black.

At the conclusion of the hearing, the district court set a time schedule for supplemental briefs and reply briefs. Thereafter, Velez adopted the supplemental memorandum filed by Quintero-Cruz.

On July 19, 1996, Magistrate Methvin issued a Report and Recommendation urging the denial of Velez's application for a writ of habeas corpus. And, on November 21, 1996, the district court entered a Judgment denying Velez's application for a writ of habeas corpus.

In compliance with section 102 of the Antiterrorism and Effective Death Penalty Act of 1996, Velez requested a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2) from the Western District of Louisiana on December 12, 1996. He also filed a Notice of Appeal. On

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[1] Apparently, the twelve-person jury ultimately seated for the trial shared the same "weak" position regarding the death penalty since they recommended life imprisonment, not death.

January 2, 1997, the district court denied Velez a certificate of appealability holding:

> The petitioner's appeal is without merit. Petitioner has failed to establish a prima facie *Batson* violation and the record fails to support any finding of purposeful racial discrimination. As a matter of law, there was no *Brady* violation, and petitioner has made no showing that the outcome of the trial would have been different. Additionally, absent outside influence, a juror may not be impeached regarding a jury verdict. The petitioner's appeal is frivolous.

In light of the district court's holding, Velez requested a certificate of appealability from the Fifth Circuit Court of Appeals on January 13, 1997. The Fifth Circuit ordered Velez to brief the issues raised by his request for a certificate of appealability and Velez filed his brief on June 20, 1997. One week after Velez filed his brief, the Fifth Circuit decided *Green v. Johnson*, 116 F.3d 1115 (5th Cir. 1997) [which held that the new provisions of the Antiterrorism and Effective Death Penalty Act apply only to petitions filed after the effective date of the act, contrary to its prior holding in *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996), and cited to *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997)].

On September 11, 1997, the Fifth Circuit issued an order holding that in light of *Green v. Johnson*, 116 F.3d 1115, 1119-20 (5th Cir. 1997), it was interpreting Velez's request for a certificate of appealability as a request for a certificate of probable cause and denying the request. The Fifth Circuit held that the two issues briefed by Velez, namely the State's use of its peremptory challenges to exclude black venire persons from the jury and the denial of a fair and impartial jury where two jurors indicated that they had been "coerced" into rendering guilty verdicts, failed "to make a substantial showing of the denial of a federal right. . . . "

B. Circuit Court of Appeals' Jurisdiction

Jurisdiction in the Fifth Circuit Court of Appeals, for purposes of obtaining a certificate of probable cause, was pursuant to 28 U.S.C. § 2253.

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REASONS FOR GRANTING WRIT OF CERTIORARI

Pursuant to Rule 10(a), Rules of the Supreme Court, this Court should exercise its certiorari jurisdiction because the Fifth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

This Court set out the standard which a petitioner must meet in order to secure appellate review of a district court's denial of a writ of habeas corpus pursuant to 28 U.S.C. § 2254, in *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983). This Court held that "a certificate of probable cause requires petitioner to make a 'substantial showing of the denial of a federal right.' " *Barefoot*, 463 U.S. at 893, 103 S. Ct. at 3394. This standard was summarized as follows:

> In requiring a 'question of some substance', or a 'substantial showing of the denial of [a] federal

> right', obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'

Barefoot, 463 U.S. at 893, 103 S. Ct. at 3395, quoting *Gordon v. Willis,* 516 F.Supp. 911, 913 (ND Ga., 1980), quoting *United States ex rel. Jones v. Richmond,* 245 F.2d 234 (2d Cir), *cert. denied* 355 U.S. 846, 78 S. Ct. 71, 2 L. Ed. 2d 56 (1957).

Although Velez satisfied this standard, the Fifth Circuit, and district court for the Western District of Louisiana, denied him a certificate of probable cause and thereby deprived him of appellate review.

I. Velez Made A Substantial Showing Of The Denial Of His Fourteenth Amendment Right To Equal Protection

Velez made a substantial showing of the denial of his Fourteenth Amendment right to equal protection. This Court has set out a three-part analysis which helps courts determine if there has been a denial of equal protection in the selection of a defendant's petit jury.

Part one of the analysis requires a defendant to establish a prima facie case of purposeful discrimination. A defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In *Batson* this Court held that a defendant establishes a prima facie case when he:

> 1. shows that he is a member of a cognizable racial group and that the prosecutor exercised his peremptory challenges to remove from the venire members of the defendant's race;[2]
> 2. relies on the indisputable fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate; and
> 3. shows that these facts and other relevant circumstances raise an inference that the prosecutor used his peremptory challenges to exclude veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96, 106 S. Ct at 1723. [citations omitted]

Once a defendant satisfies part one of this analysis, the burden shifts to the state. Part two of the analysis requires the prosecutor to articulate a neutral explanation related to the particular case to be tried. *Batson,* 476 U.S. at 98, 106 S. Ct. at 1724. This Court has specifically noted that a prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption that they will be partial to the defendant. This Court has noted:

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[2] In 1991 this Court held that a criminal defendant may object to the race-based exclusion of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race. *Powers v. Ohio,* 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

> Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." [cites omitted]

Batson, 476 U.S. at 97, 106 S. Ct. at 1723.

In 1991, this Court re-examined part two of the *Batson* analysis. This Court held that a neutral explanation means an explanation based on something other than the race of the juror. The issue is the facial validity of the prosecutor's explanation for his exercise of peremptory challenges. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York,* 500 U.S. 352, 360, 111 S. Ct. 1859, 1866, 114 L. Ed. 2d 395 (1991).

Part three of the analysis requires a trial court to determine if the defendant has established purposeful discrimination. *Batson,* 476 U.S. at 98, 106 S. Ct. at 1724.

When a prosecutor offers a race neutral reason for the exercise of his peremptory challenges, but the reason has a disproportionate impact on a particular race, the trial court may consider the disproportionate impact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination. *Hernandez,* 500 U.S. at 363, 111 S. Ct. at 1868.

Velez established that the prosecution excused fifteen of the seventeen black venire persons who had been death qualified by the trial court. The stated reason for excluding these venire persons was their weak position on the death penalty. One black venire person was excused without being questioned. The prosecutor admitted that she personally believed blacks, as a group, do not favor the death penalty. She also admitted to using the racial epithet "nigger". After numerous defense objections, one black served as a juror.

These facts were sufficient to establish a prima facie case of purposeful discrimination. Eighty-eight percent of the blacks who were death qualified by the trial court were excused through the use of peremptory challenges, because the prosecutor believed that blacks do not favor the death penalty. *See, Batson,* 476 U.S. at 83, 106 S. Ct. at 1715 (where four blacks were excluded through the use of peremptory challenges); *Powers,* 499 U.S. at 403, 111 S. Ct. at 1366 (where the prosecutor used seven of ten peremptory challenges to exclude blacks); *Edmonson v. Leesville Concrete Company, Inc.,* 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991) (where counsel used two of three peremptory challenges to remove black persons from the prospective jury); and *Modden v. Texas,* 485 U.S. 1040, 108 S. Ct. 1603, 99 L. Ed. 2d 917 (1988) ([Justice Marshall's dissent] where Justice Marshall observed that in his opinion the prosecutor's use of three peremptory challenges to exclude black jurors from the venire and the fact that only one black served on the jury was sufficient to establish a prima facie case under *Batson*.)

In addition, the prosecutor's assumption that blacks, as a group, do not favor the death penalty is exactly the type of assumption forbidden by the Fourteenth Amendment. It is not race neutral. Although the prosecutor specifically noted her reason for challenging each black juror, the most frequently cited reason was the juror's weak position on the death penalty. Certainly the prosecutor's assumption that blacks do not favor the death penalty would cause her to interpret a black juror's answers regarding the death penalty in a more stringent manner than another racial group's. Thus, the prosecution failed to rebut Velez's prima facie case of purposeful discrimination with a race neutral explanation.

Velez has made a substantial showing of the denial of his constitutional right to equal protection. This issue is, at the very least, debatable among jurists of reason. *See*, Justice Marshall's dissent in *Modden*, 485 U.S. 1040. This issue deserved encouragement to proceed further. The Fifth Circuit erred in denying Velez a certificate of probable cause. The Fifth Circuit departed from the accepted and usual course of judicial proceedings such that this Court should exercise its supervisory power and grant a writ of certiorari.

II. Velez Made A Substantial Showing Of The Denial Of His Sixth Amendment Right To A Fair And Impartial Jury.

The Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees a state defendant the right to an impartial jury. *Ristaino v. Ross,* 424 U.S. 589, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976). Constitutional standards of fairness require that a state defendant have a panel of impartial and indifferent jurors. *Murphy v. Florida,* 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).

This Court has held that if even one juror is unduly biased, a criminal defendant is denied his constitutional right to an impartial jury. In a criminal case, any private communication, contact or tampering with a juror, during the trial, is presumptively prejudicial. *Remmer v. United States,* 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954).

At Velez's trial, two jurors sent the trial court a note indicating that they had been coerced into rendering first degree murder convictions. The note failed to indicate who had been involved in the coercion. The note provided:

> Your Honor,
>
> I made a decision of 2nd degree murder but was told it had to be 1st degree murder because of money involved. What can I do? I feel I was coerced. I'm having a hard time living with 1st degree. Please tell me something.
>
> W. Hartnell

And I'm not the only one.

I, Edna Shaw, feel I was coerced in making a decision of 1st degree murder that I can not live with.

Edna Shaw

Although Louisiana law prohibits jurors from impeaching their verdict, the one exception is that jurors may testify regarding outside influences. La. C. Evid. Article 606(B). To date, no court has ever inquired whether the two jurors were coerced by someone outside the jury. That single question would have allowed a court to make an informed decision as to whether a hearing was necessary and whether Velez's constitutional right to a fair and impartial jury was violated.

Under circumstances similar to those of Velez's, courts have granted evidentiary hearings to determine whether a defendant's Sixth Amendment right has been violated. *See, Lawson v. Borg*, 60 F.3d 608 (9th Cir. 1995) (where the Ninth Circuit held that the allegations in a state murder trial warranted an evidentiary hearing on federal habeas corpus review, given that the state court failed to provide a hearing.)

Thus, Velez has made a substantial showing of the denial of his Sixth Amendment right to a fair and impartial jury. Certainly, the issue is debatable among reasonable jurists and could be resolved differently as evidenced by the *Lawson* case. The Fifth Circuit's failure to grant Velez a certificate of probable cause was such a departure from the accepted course of judicial procedure that this Court should exercise its supervisory powers and grant certiorari.

◆

CONCLUSION

Based on the foregoing facts and law, petitioner, Miguel Velez, requests that this Court grant him a writ of certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-31290
USDC No. 94-CV-120

MIGUEL VELEZ,

Petitioner-Appellant,

versus

RICHARD L. STALDER, Warden,
Wade Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

(Filed Sep. 11, 1997)

ORDER:

Miguel Velez seeks a certificate of appealability (COA) to appeal from the dismissal of habeas corpus action. Because Velez's habeas petition was filed before the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA), Velez must obtain a certificate of probable cause (CPC) rather than a COA. *Green v. Johnson,* 116 F.3d 1115, 1119-20 (5th Cir. 1997). We construe Velez's COA motion as a motion for a CPC.

Because Velez failed to brief his claim that the State failed to obtain from the federal authorities certain information requested by Velez about two State witnesses, that claim is abandoned for determining whether a CPC should issue. *See Anderson v. Butler,* 886 F.2d 111, 112 (5th Cir. 1989); *Beasley v. McCotter,* 798 F.2d 116, 118 (5th Cir. 1986).

Velez briefs the following issues: (1) the State purposefully used its peremptory challenges to exclude African-American venire persons from the jury; and (2) his right to a fair and impartial jury was denied when two jurors expressed concerns about the jury verdict and the trial court failed to repoll the jurors, conduct an evidentiary hearing, or declare a mistrial. Velez fails to make a substantial showing of the denial of a federal right on these claims. *See Barefoot v. Estelle,* 463 U.S. 880, 893 (1983). Accordingly, CPC is DENIED.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

MIGUEL VELEZ	CIVIL DOCKET NUMBER 94-0120
VS.	JUDGE SHAW
KELLY WARD, WARDEN, ET AL	MAGISTRATE JUDGE METHVIN

CERTIFICATE OF APPEALABILITY

(Filed Jan. 2, 1997)

The defendant has requested a certificate of appealability from the district court's denial of his motion for relief under:

[X] 28 U.S.C. § 2254

[ ] 28 U.S.C. § 2255

The defendant is:

[X] A pauper

[ ] Not a pauper

After complete review of the record the court finds:

[ ] The district court is without authority to issue a certificate of appealability sought by the petitioner from a denial of his motion for relief under 28 U.S.C. § 2255.

[ ] A certificate of appealability shall issue upon this court's finding that the petitioner has demonstrated that the issues are debatable among jurists of reason; that a court

could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further, for the reasons set forth below.

[X] A certificate of appealability shall not issue for the reasons stated below:

REASONS:

The petitioner's appeal is without merit. Petitioner has failed to establish a prima facie *Batson* violation and the record fails to support any finding of purposeful racial discrimination. As a matter of law, there was no *Brady* violation, and petitioner has made no showing that the outcome of the trial would have been different. Additionally, absent outside influence, a juror may not be impeached regarding a jury verdict. The petitioner's appeal is frivolous.

THUS DONE AND SIGNED at Lafayette, Louisiana, this 31st day of December, 1996.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

MIGUEL VELEZ,	CIVIL ACTION NO. 94-0120
VERSUS	JUDGE SHAW
KELLY WARD, WARDEN, WADE CORRECTIONAL CENTER.	MAGISTRATE JUDGE METHVIN

JUDGMENT

(Filed Nov. 21, 1996)

This matter was referred to United States Magistrate Judge Mildred E. Methvin for her Report and Recommendation. After an independent review of the record, and considering the objections filed, this Court concludes that the Report and Recommendation of the magistrate judge is correct and this Court adopts the conclusions set forth therein.

Accordingly, IT IS HEREBY ORDERED that petitioner's application for writ of habeas corpus is DENIED and this matter is DISMISSED with prejudice.

Lafayette, Louisiana, this 21st day of November, 1996.

/s/ John M. Shaw
JOHN M. SHAW
Chief Judge,
U.S. District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

LUIS CARLOS
QUINTERO-CRUZ

VERSUS

KELLY WARD, WARDEN,
WADE CORRECTIONAL
CENTER

CIVIL ACTION
NO. 93-2027
LAKE CHARLES
DIVISION

JUDGE SHAW

MAGISTRATE JUDGE
METHVIN

MIGUEL VELEZ

VERSUS

KELLY WARD, WARDEN,
WADE CORRECTIONAL
CENTER

CIVIL ACTION
NO. 94-0120
LAFAYETTE-OPELOUSAS
DIVISION

JUDGE SHAW

MAGISTRATE JUDGE
METHVIN

REPORT AND RECOMMENDATION

(Filed Jul. 19, 1996)

Luis Carlos Quintero-Cruz and Miguel Velez were convicted of first-degree murder in 1987 following a five-week jury trial in the Fourteenth Judicial District Court, Calcasieu Parish, Louisiana. Petitioners are currently serving life sentences. Petitioners each filed an application for habeas relief under 28 U.S.C. § 2254. Since petitioners were tried together and their habeas claims overlap, this report and recommendation will address both habeas petitions.

Among other claims, Velez and Cruz each allege a violation of their constitutional rights under *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986). An evidentiary hearing on the *Batson* issue was held July 12, 1995. At the request of the parties, a transcript of the hearing was provided for purposes of filing post hearing briefs. The briefs were filed by October 19, 1995, and the matter was taken under advisement. Considering the facts presented at the hearing, and the briefs of the parties, I conclude that petitioners are not entitled to habeas relief.

BACKGROUND

A full recitation of the background of this case is accurately set forth in the opinion by the Louisiana Third Circuit Court of Appeal affirming the convictions of Velez and Cruz. *State v. Velez*, 588 So.2d 116 (La.App.3d Cir.1991). A copy of the opinion is attached hereto as "Appendix A." For purposes of this report, a brief summary will suffice.

The murder victim, Barry Seal, had been a pilot and drug smuggler for the Medellin Cartel, a Columbian cocaine enterprise. After Seal's apprehension and conviction in federal court in Florida, Seal became a government informant. As a result of Seal's cooperation, indictments were brought against Pablo Escobar and Jorge Ochoa, two of the top men in the Medellin Cartel. Ultimately, because of his cooperation with the federal government, Seal's ten-year sentence in Florida was reduced to time served. Pursuant to his agreement with the federal government, Seal pled guilty to additional drug charges in the Middle District of Louisiana, allegedly with the understanding that he would receive no harsher sentence than that which had been imposed in Florida. However, at his sentencing, Judge Polozola ordered Seal to serve six months in a Baton Rouge halfway house as a condition of his probation. Seal was required to report to the halfway house at 6:00 p.m. each day, spend the night, and leave the following morning at 7:00 a.m. As predicted by his attorney, Seal was murdered three weeks later, on February 19, 1986, as he arrived at the halfway house.

Velez, Cruz, and co-defendant Antonio Vasquez were indicted in the Nineteenth Judicial District Court, East Baton Rouge Parish on charges of first-degree murder for the contract killing of Seal. The trial was transferred to Lake Charles due to extensive pretrial publicity. Jury selection took three weeks, and the trial took five weeks. At the conclusion of the trial, the 12-person jury unanimously found each of the defendants guilty of first-degree murder.[1] At the penalty phase of the trial, the jury recommended life sentences without benefit of parole, probation or suspension of sentence.

ISSUES PRESENTED

Velez raises the following grounds for relief: (1) the prosecution improperly used its peremptory challenges to exclude prospective jurors solely on the basis of their race in violation of *Batson*; (2) the prosecution improperly failed to disclose certain *Brady* material which would have impeached the credibility of two of the State's key witnesses, Luis Carlos Uribe-Munera and Max Mermelstein; and (3) the trial court erred in denying the defense's motion to re-poll the jury, conduct an evidentiary hearing, or declare a mistrial after receiving two notes from four jurors suggesting they had been "coerced" regarding their verdict.[2]

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[1] The Louisiana Third Circuit Court of Appeals reversed Vasquez' conviction and remanded his case for entry of judgment of second-degree murder. His conviction is not before the court.

Cruz raises two issues: (1) the identical *Batson* issue raised by Velez; and (2) the trial court erred in refusing to give a special jury instruction regarding the unreliability of eyewitness testimony.

EXHAUSTION OF REMEDIES

Both petitioners appealed their convictions. Velez raised the following assignments of error: (1) the trial court erred in allowing the state to use its peremptory challenges improperly to exclude jurors on the basis of race; (2) the trial court erred in allowing other crimes evidence to be presented to the jury; (3) the trial court erred in failing to require the state to produce certain information about two of the state's witnesses, Luis Carlos Uribe-Munera and Max Mermelstein; (4) the trial court erred in denying the motion to suppress the results of a gunshot residue test performed on petitioner thirteen hours after the murder occurred; (5) the trial court erred in refusing to suppress the identification of petitioner by Robert Lane; (6) the trial court erred in denying petitioner's motion to re-poll the jury, conduct an evidentiary hearing, or grant a new trial based on an invalid verdict as evidenced by a **single note** sent to the trial judge by two jurors after the guilt phase and during the penalty phase of the trial; and (7) petitioner's conviction was based on insufficient evidence.

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[2] Following the evidentiary hearing in this court, the court granted Cruz's oral motion to adopt this ground. Counsel was allowed to file a formal motion and the State has responded.

Petitioner Cruz raised some of the same assignments of error as Velez, specifically grounds No. 1,2,3, and 6 set forth above. Cruz also raised the following issues: (1) the trial court erred in refusing to allow Dr. Gary Wells, proffered as an expert witness in the field of eyewitness identification, to testify and in refusing to hold an evidentiary hearing regarding the liability and admissibility of witness Benny Louis' identification testimony; (2) the trial court erred in not providing a transcript of the jury charge conference at which the defense unsuccessfully argued entitlement to a special instruction on eyewitness identification; and (3) the trial court erred in denying petitioner's request for a special jury instruction regarding evaluation of eyewitness identification testimony.

The Third Circuit affirmed petitioners' convictions. *State v. Velez,* 588 So.2d 116 (La.App.3d Cir.1991). The Louisiana Supreme Court denied petitioners' application for writs. *State v. Velez,* 592 So.2d 408 (La.1992). The U.S. Supreme Court denied petitioners' application for certiorari. *Quintero Cruz v. Louisiana,* ___ U.S. ___, 112 S.Ct. 3031, ___ L.Ed.2d ___ (1992).

The State concedes that petitioners have exhausted their state remedies as to all issues with the exception of a second juror note sent to the trial judge during the penalty phase of the trial. I find that with the exception of the second juror note, the issues presented in the instant petition were previously presented to the Louisiana courts on direct review.

With respect to the second juror note, I issued an order filed December 2, 1994 which stated in pertinent part:

> Reviewing the pleadings before the court, it appears that Velez has in fact not exhausted one of his claims. Velez complains, among other things, that the trial court erred in denying the defense's motion to re-poll the jury, conduct an evidentiary hearing, or declare a mistrial based upon two separate notes sent to the trial judge by a total of four jurors following the guilty verdict Velez raised before the state court system complaints regarding the first juror note. That note was dealt with in a lengthy opinion by the Louisiana Third Circuit Court of Appeal, *State v. Velez,* 588 So.2d 116, 138-139 (La.App.3 Cir.1991). The Third Circuit concluded that the juror note did not reflect any extraneous influence on the jury, and concluded that the trial judge's analysis that the note only reflected a "second thought" situation was not an abuse of discretion. The Third Circuit cited Louisiana statutory and case law authorities which hold that a jury verdict may not be challenged by testimony of an individual juror in an attempt to impeach the verdict of the jury or to describe misconduct within the jury room. *Id.* at p. 138.
>
> It appears that two other jurors sent a second note to the trial judge, also during the penalty phase of the trial. Velez contends the trial

> judge refused to have a hearing regarding this second note. However, the issues surrounding the second jury note apparently were not raised on appeal and have not been considered by the Louisiana Courts. The nature of the second note and whether it reflected any extraneous influence on the jury has not been presented to the Louisiana courts as required by the exhaustion doctrine.
>
> This court is required to dismiss mixed petitions unless one of the narrow exceptions to the exhaustion requirement applies. *Rose v. Lundy,* [455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982)].

(Order, Rec. Doc. 21, pp. 1-2).

The latter order allowed Velez an opportunity to address the exhaustion issue as to the second juror note in a separate brief. In his brief, Velez states that the second juror note requested a private meeting with the trial judge, and was signed by two different jurors from those who signed the first note. Velez contends that the substance of his constitutional claims as to the two juror notes are the same, although the "form of Velez's argument has changed slightly" in light of the specific nature of the second note. (Rec. Doc. 20, p. 3). Velez also states that, "[i]f this court determines that the second jury note presents an individual issue which has not been exhausted, Velez voluntarily withdraws that claim and requests that this Court proceed with the remaining claims." (Rec. Doc. 20, p. 8).

Habeas corpus relief is available to a person who is in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254. However, the right to pursue habeas relief in federal court is qualified. It is well settled that a petitioner seeking federal habeas corpus relief cannot collaterally attack his state court conviction until he has exhausted all available state remedies. *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982); *Minor v. Lucas*, 697 F.2d 697 (5th Cir. 1983). Exhaustion generally requires only that the constitutional claims have been fairly presented to the highest state court either on direct review or in a post conviction challenge. *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971).

The exhaustion requirement is not a jurisdictional bar but a procedural one erected in the interest of comity to allow state courts the first opportunity to pass upon and correct alleged constitutional violations. *Picard*, 404 U.S. at 275; *Rose*, 455 U.S. at 518. It is a policy of judicial abstention which recognizes that federal habeas courts should not disrupt ongoing state proceedings. *Id.* Absent exceptional circumstances, this court is not authorized to interfere with state court proceedings. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed. 2d 433 (1983). Exceptional circumstances may exist when a state system unjustifiably delays review of a petitioner's claims so as to impinge on his due process rights. However, the exhaustion requirement will be excused only where the delay is completely the fault of the state. *Deters, supra*.

Federal courts cannot hear habeas petitions containing both exhausted and unexhausted claims. *Rose*, 455 U.S. at 510. A state prisoner who submits such a "mixed petition" may either return to the state courts to complete the exhaustion requirement, or amend the habeas petition to present only exhausted claims to the federal court. *Id.*

The record clearly reflects that petitioners have not exhausted available state remedies as to the second juror note. Neither have they demonstrated that exceptional circumstances exist which would warrant waiver of the exhaustion policy by this court. This court is authorized to dismiss a federal habeas petition which reveals either on its face or upon review of the entire record that the requirement of exhaustion of state remedies has not been satisfied. *Deters supra; Resendez v. McKaskle,* 722 F.2d 227, 231 (5th Cir. 1984). However, in view of the petitioners' request to withdraw the unexhausted claim in lieu of dismissal of this mixed petition, I conclude that dismissal is not required. The issue as to the second juror note will be considered withdrawn. However, in the event the court should conclude that the claim as to the second juror note has been adequately exhausted, the analysis on the merits set forth below is equally applicable to both notes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. BATSON ISSUE

The Law

Before addressing the facts of this case, it is helpful to review the applicable law so that this court can properly assess whether the findings of the Louisiana Third Circuit Court of Appeal are legally and factually sound, and concomitantly whether the factual findings are entitled to a presumption of correctness.

The use of peremptory challenges to exclude persons from a petit jury on the basis of their race or gender violates the Equal Protection Clause of the Fourteenth Amendment. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court set forth a three-step test for evaluating whether a prosecutor's use of peremptory challenges is race-based in violation of equal protection. The test was later modified by *Powers v. Ohio*, 499 U.S. 4900, 415 (1991).

First, the defendant must establish a prima facie case of intentional racial discrimination by showing that: (1) the defendant is a member of a cognizable racial group; (2) the group's members (or, as modified by *Powers*, any other cognizable racial group) have been excluded from defendant's jury; and (3) the circumstances of the case raise an inference that the exclusion was based on race.

Second, once a prima facie showing of intentional discrimination is established, the burden shifts to the proponent of the peremptory challenge to offer a facially race-neutral explanation. This explanation must be more than an assertion of good faith, or an assumption that the juror's race would make him partial to the defendant, but it need not be "persuasive, or even plausible." *Purkett v. Elem*, ___ U.S. ___, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (per curiam).

Finally, the court must determine whether the explanation is facially race-neutral and whether the opponent of the peremptory challenge has proven purposeful racial discrimination. This assessment turns largely upon the court's evaluation of the credibility of the party exercising the challenge. *Id.*, 115 S.Ct. at 1770-71. *See also Hernandez v. New York*, 500 U.S. 352 (1991) (plurality opinion).

The Facts

Jury selection in the instant case took place between April 6 and April 23, 1987. More than 300 jurors were examined during voir dire. The prosecutor, Premila Burns, used 15 peremptory challenges against black prospective jurors and 21 against whites. Counsel for Velez and Cruz made contemporaneous objections as to some of these challenges.[3] The 12-member jury finally selected included eleven whites and one black. Only one juror of petitioners' race (Hispanic) was called during voir dire, and he was excluded for cause.[4]

The trial judge overruled the defendants' *Batson* objections as to the challenged black jurors, finding that since the defendants were of a different race (Hispanic) than the jurors in question, they lacked standing to object. Indeed, *Batson*, which was decided in April 1986, required the defendant to show that the prosecutor had exercised peremptory challenges to remove from the venire members of his ***own*** race. Concluding that *Batson* was inapplicable, the trial judge refused to require the prosecutor to enunciate a race-neutral explanation for the disputed challenges.

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[3] At the evidentiary hearing, petitioners' counsel, who were also trial counsel, asserted that their *Batson* objections were enunciated as to all of the State's challenges. However, notes of the prosecutor made simultaneously with the voir dire show that no contemporaneous objections were made as to some of the peremptory challenges. This discrepancy is not material as the state court addressed all of petitioner's *Batson* claims on the merits, and did not rule on the basis of procedural default.

[4] *See* Memorandum in Opposition to Petition, Record Doc. 18, p. 14.

While the instant case was on appeal before the Louisiana Third Circuit of Appeal, the U.S. Supreme Court decided *Powers, supra*. In *Powers*, the Supreme Court held that the discriminatory use of peremptory challenges jeopardizes the integrity and fairness of the judicial process, an interest which ***any*** defendant has standing to raise via a *Batson* objection. *Powers* instructed that racial identity between the defendant and the challenged jurors is only one factor to be considered in determining whether the defendant has made a prima facie showing of discrimination.

In light of *Powers*, the Third Circuit concluded that the trial judge had improperly based his decision on standing. The court nevertheless affirmed the lower court's ultimate conclusion that no *Batson* violation had occurred. After an examination of the record, particularly the voir dire transcript, the court concluded that defendants had failed to make a prima facie showing of discrimination as required by *Batson*.

Presumption of Correctness

In habeas cases, the factual findings of state courts are presumed to be correct. 28 U.S.C. §2254(d). Absent procedural error, such factual findings may be set aside "only if they are 'not fairly supported by the record.' " *Purkett*, 115 S.Ct. at 1771 (quoting §2254(d)(8) and citing *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983)); *Kuhlmann v. Wilson*, 477 U.S. 436, 441, 106 S.Ct. 2616, 2620, 91 L.Ed.2d 364 (1986).

Contrary to petitioners' assertions, a trial court's finding that no prima facie *Batson* violation has been established is a finding of fact, not a finding of law or a mixed question of fact and law. *See Senegal v. White,* 881 F.Supp 1421 (N.D.Ca.1995), and cases cited therein; *United States v. Vasquez-Lopez,* 22 F.3d 900 (9th Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 239, 130 L.Ed.2d 162 (1994). Such *Batson* findings are entitled to a deferential standard on review. *Purkett,* 115 S.Ct. at 1771-1772.

At the outset of the evidentiary hearing held on the *Batson* issue, the parties were advised that they should draw no inference from the fact that a hearing was being held with respect to the issue of whether the Third Circuit's findings would be accorded a presumption of correctness. In other words, the parties were not to presume that since this court had scheduled an evidentiary hearing, it had already concluded that the state court's findings were not supported by the record or were otherwise not entitled to the presumption under § 2254(d).

An evidentiary hearing under § 2254 is proper with or without a finding to the presumption of correctness. Section 2254(d) specifically states:

> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such

> factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. §2254(d). By its clear language this provision indicates that a federal court need not conclude that some defect exists in the state court proceeding in order to hold an evidentiary hearing in a habeas matter. More important, unless and until the federal court finds that one of the exceptions applies to deprive the state court findings of the presumption of correctness, "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

Turning to the case at hand, the Third Circuit made the following factual findings in concluding that defendants failed to establish prima facie *Batson* violation:

> The record before us reveals the following circumstances. Over 300 venirepersons were interviewed during voir dire. The prosecutor was given 36 peremptory challenges and exercised 21 challenges on whites and 15 challenges on blacks. The prosecutor asked similar questions of black and white prospective jurors and spent generally as much time questioning blacks as whites. Approximately eight blacks were excused because of reservations concerning the death penalty, just as numerous whites were excused for the same reason. One black female was seated on the jury and the prosecutor accepted a black who was excluded by defense counsel, both of which occurred before the State exhausted its peremptory challenges.

> The defendants had no racial identity with the challenged jurors, although it is true they were all members of minority groups. The defendants were charged with first degree murder which requires a unanimous verdict, discounting an inference that the prosecutor may have allowed a minimum number of blacks on the jury because their votes may not ultimately count, such as in a noncapital case which requires the concurrence of only ten jurors for a guilty verdict. *Finally, we note the record reflects no pattern of strikes against blacks and no systematic exclusion of blacks from this jury. What we detect from the voir dire transcript is the prosecutor's preoccupation with seating jurors open to, and comfortable with, the death penalty, a characteristic she would have understandably desired for all jury members.*

State v. Velez, 588 S.2d at 126.[5]

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[5] Based upon its findings of fact, the Third Circuit concluded as follows:

> The facts presented in this case do not establish a prima facie case of purposeful discrimination. We conclude, as did the *Thompson* court, the State did not exercise its peremptory challenges with a discriminatory purpose. Neither the voir dire transcript nor the numerical evidence concerning the prosecutor's challenges support such in inference; accordingly, the State was under no obligation to present racially neutral reasons for each peremptory challenge of a black venireperson. While it is true the trial judge incorrectly determined that defendants did not have standing to object under *Batson*, the trial judge ultimately did not err in denying defendants' motion for mistrial based on the State's exercise of its peremptory challenges against blacks because no

With the exception of the two italicized sentences, petitioners do not dispute the factual findings of the Third Circuit quoted above, and admit that they are entitled to a presumption of correctness under 28 U.S.C. §2254(d).[6] The two disputed sentences will be addressed in turn.

Petitioners first contend that the finding of the Third Circuit that "the record reflects no pattern of strikes against blacks and no systematic exclusion of blacks" is not supported by the record and therefore is not entitled to a presumption of correctness. Petitioners argue as follows:

> * * * Louisiana follows a "use-it-or-lose-it" method of jury selection. If a prospective juror is not peremptorily challenged, that prospective juror becomes a member of the jury. Consequently, any pattern of strikes and any systematic exclusion become clearer as the number of blacks, who were struck, increases. In this case, a total of fifteen blacks were struck by the State. Ten of those fifteen prospective black jurors were stricken before the State accepted black juror Washington on April 19th. Five more black jurors in a row were struck before the State accepted black prospective juror Shaw on April 22nd. * * *

> prima facie showing of purposeful discrimination was made.

State v. Velez, 588 So.2d at 127.

[6] Cruz's Supplemental Memorandum of Law (post-hearing brief), (*Cruz* Rec. Doc. 47, pp. 4-5). Velez was allowed to adopt Cruz's post-hearing brief. (*Velez* Rec. Doc. 45).

(*Cruz* Supplemental Memorandum of Law, Rec. Doc. 47, p. 6).

It should first be noted that the Third Circuit's finding that there was "no pattern of strikes against blacks" must be interpreted as meaning there was no *discriminatory* pattern of strikes against blacks. Clearly there was some "pattern" of strikes against blacks just as there was a "pattern" of strikes against whites. The record shows that the prosecutor exercised 15 of her 36 peremptory challenges against black jurors in the following order: Peremptory Challenge Nos. 1, 3, 8, 10, 16, 19, 21, 23, 24, 26, 29, 31, 32, 34, 36.[7] The intervening challenges were exercised against whites. Even assuming that ten blacks in a row were peremptorily challenged by the prosecution before a black juror was accepted, this alone is insufficient to establish an inference of discriminatory intent – the third factor required to establish a prima facie *Batson* violation – if other factors show otherwise. "There is no magic number of challenged jurors which shifts the burden to the government to provide a neutral explanation for its actions. Rather the combination of circumstances taken as a whole must be considered." *United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir. 1989). *See also Vasquez-Lopez, supra*, 22 F.3d at 902 ("[I]t is not per se unconstitutional, without more, to strike one or more Blacks from the jury. A district court must consider the relevant circumstances surrounding a peremptory challenge.").

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[7] *See* State's Exhibit No. 1 introduced at the evidentiary hearing, as well as transcript of the hearing, pp. 37-60.

In determining whether an inference of discrimination should be drawn from a prosecutor's exercise of peremptory challenges, a court may consider any relevant circumstances, including the following (1) the number of racial group members in the venire panel; (2) the nature of the crime; (3) the race of the defendant and victim; (4) a pattern of strikes against racial group members; and (5) the prosecution's questions and statements during voir dire. *Simmons v. Beyer,* 44 F.3d 1160, 1167 (3d Cir.), *cert. denied,* 116 S.Ct. 271 (1995).

The Third Circuit carefully reviewed the record of voir dire and considered all of the factors listed above in addition to several others. The court found that approximately eight blacks and numerous whites were excused because of reservations concerning the death penalty; that one black was seated on the jury and another was accepted by the prosecutor but was excluded by defense counsel, and that the prosecutor had accepted both blacks before the State exhausted its peremptory challenges. The record of voir dire is succinctly summarized in the state's brief as follows:

> * * * In the instant case, the state challenged more white jurors than black jurors. At the conclusion of voir dire, twenty-one white jurors had been challenged by the state and only fifteen blacks were challenged by the state. (SR vol.34 p. 9015) Also, a careful review of the record reveals that the prosecutor asked the same questions of each juror during voir dire. On each examination, the prosecutor began by explaining the first degree murder statute and the concept of principals to a crime. The state further gave examples wherein people were not present

> at the time offenses were committed but were principals to the crimes. The prosecutor then explained the burden of proof and that there must be three separate verdicts in the instant case. She explained the two phases of the trial, i.e., guilt phase and sentencing phase, asked the jurors if they could sentence someone to death, and then explained a contract killing. The prosecutor asked the jurors individually if they would fault the victim because he was a convicted drug smuggler; the prosecutor also asked each juror if he could treat petitioner fairly even though petitioner was not a United States citizen. Finally, the prosecutor explained circumstantial evidence to each juror and gave examples of circumstantial evidence to each juror.
>
> Given the pattern of neutral questions asked by the prosecutor of every juror regardless of his race and the fact that twenty-one white jurors were challenged and only fifteen black jurors were challenged the state contends no prima facie showing was made by the defense at trial. The relevant circumstances of this case do not create any inference of purposeful discrimination.

(Memorandum of the State, *Velez* Rec. Doc. 18, pp. 15-16).

Considering the foregoing, I conclude that the Third Circuit's factual determination that there was "no pattern of strikes against blacks and no systematic exclusion of blacks from [the] jury" is entitled to a presumption of correctness.

The second factual finding which petitioners challenge is the Third Circuit's statement that, "[w]hat we detect from the voir dire transcript is the prosecutor's preoccupation with seating jurors open to, and comfortable with, the death penalty, a characteristic she would have understandably desired for all jury members." *State v. Velez,* 588 So.2d at 126. Petitioners concede that the latter statement is a factual finding entitled to a presumption of correctness[8], but argue that:

> [T]his statement cannot explain all of the State's peremptory challenges leveled against black prospective jurors. Again, one need only review the transcript in so far (sic) as the voir dire inquiry of prospective black jurors Charles and Cormier to determine that this factual finding is not fairly supported by the record to the extent that the appellate court intended that statement to justify every peremptory challenge.

(*Cruz* Supplemental Memorandum (adopted by Velez), Rec. Doc. 47, p. 8). I find this argument without merit. For the reasons stated above, I find that the Third Circuit correctly applied the *Batson* rule, and entered detailed factual findings which are supported by the record and which are entitled to a presumption of correctness. Petitioners' argument with respect to prospective jurors Charles and Cormier will be discussed in more detail below.

Evidentiary Hearing

Petitioners focus their *Batson* claims on the peremptory challenges exercised against two particular black jurors, Rosa M. Charles and Hodges J. Cormier, Jr.[9] Petitioners contend that the record of voir dire as to these jurors contains no evidence of a race-neutral explanation for the prosecutor's exercise of peremptory challenges against them. Velez contends:

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[8] *Cruz* Supplemental Memorandum (adopted by Velez), Rec. Doc. 47, p. 8.

> Here, the record does not fairly support a finding that prospective jurors Charles and Cormier were excluded for the race-neutral reason that these jurors might be adverse to the State's desire to impose the death penalty.
>
> Likewise, the record does not fairly support a finding that there was absolutely no inference of discrimination in the challenges made to those two African-American jurors. The striking of these two African-American jurors followed mere cursory questioning. That questioning did not elicit an answer that could rationally explain strikes on the basis of race-neutral reasons. This alone is all that is necessary to create an inference of discrimination.

(*Velez* Rec. Doc. 2, pp. 4-5).

For the reasons stated above, I find ample evidence in the record that the prosecution did not exercise its peremptory challenges solely on the basis of race, and that no prima facie *Batson* violation was established by petitioners. Even if this court were to conclude that the appeals court erred and that petitioners established a prima facie *Batson* claim at trial, petitioners' *Batson* claim must fail considering the evidence presented at the hearing.

---

[9] Petitioners appear to concede that the record contains race-neutral explanations for the prosecutor's challenges against other black jurors.

Once a prima facie *Batson* claim is established, the burden shifts to the prosecution to offer a facially race-neutral explanation for the peremptory challenge at issue. This explanation need not be "persuasive, or even plausible." *Purkett,* 115 S.Ct. at 1771. The third step is a determination whether the prosecutor's explanation is facially race-neutral and whether the petitioners have proven purposeful racial discrimination. *Id.*

The testimony and other evidence presented at the evidentiary hearing eradicated petitioners' *Batson* claims. Prosecutor Premila Burns provided testimony in impressive detail with respect to all aspects of the voir dire which took place at petitioners' trial. Ms. Burns had made and still had in her possession contemporaneous notes with respect to the name and race of each juror questioned, who challenged the juror, the reasons for the challenge if exercised by the prosecution, and whether any contemporaneous objection was made as to the challenge. Ms. Burns' testimony also corroborated facts contained in the record and relied upon by the Third Circuit in its finding that petitioners failed to establish a prima facie *Batson* violation.

Copies of Ms. Burns' notations were introduced into evidence as State's Exhibits 1, 2, 3 and 4. The State also introduced the master juror list which contains additional information regarding the number of jurors in the entire venire and some information regarding their race. The evidence confirms that of the 36 peremptory challenges exercised by the State, 15 were exercised against black jurors and 21 were exercised against white jurors. Ms. Burns went down the list of each peremptory challenge, providing the specific reasons for the challenge.[10]

Most of the state's peremptory challenges against the 15 black jurors were exercised because of their weak position on capital punishment. The state was seeking the death penalty against all three defendants. However, other reasons Ms. Burns noted for exercising the peremptory challenges included issues regarding the intelligence of the juror, expressions of fear regarding the defendants, and in one case, the fact that the juror had recently been fired for sleeping on the job combined with a statement by the juror that he would automatically vote for the death penalty as to the trigger man.

With respect to the two jurors specifically mentioned by petitioners, Ms. Burns offered credible race-neutral explanations for her challenges. There were three reasons for the peremptory strike against Rosa Charles. The first was that she seemed unresponsive to the questions asked by the state. The second was that the prosecutor sensed that Ms. Charles would have a problem returning the death penalty as to the non-present principals to the crime. The third was that none of the defense attorneys asked questions of the juror, thus raising the prosecutor's suspicions that they had inside information about her.[11]

There were two race-neutral reasons offered for exercising the peremptory strike against Hodges Cormier.

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[10] *See* the transcript of evidentiary hearing (TR pp. 40, *et seq.)*

[11] TR pp. 52-53.

First, Ms. Burns testified that Cormier was obviously homosexual. Second, Cormier indicated to the judge that he had stitches in his foot which would require removal during the trial.[12]

As discussed above, once the prosecution articulates a race-neutral explanation for removing a juror, the court must determine whether the opponent of the strike has proved purposeful discrimination. The Supreme Court has emphasized that at the third step, the ultimate burden of persuasion is upon the opponent of the strike. *Purkett, supra* 115 S.Ct. at 1771. Applying this standard to the facts presented, I conclude that no *Batson* violation occurred. The prosecutor not only offered race-neutral explanations for her peremptory challenges, she also produced contemporaneous notes from the 1987 trial establishing that the reasons offered at the evidentiary hearing were not fabricated or falsely recalled. The reasons offered at the hearing for the peremptory challenges are also corroborated by the transcript of the jury voir dire.

Finally, petitioners failed to introduce any evidence whatsoever that the proffered reasons were pretextual, or that the prosecutor's challenges were the product of purposeful discrimination.

Accordingly, I conclude that petitioners are not entitled to habeas corpus relief on the *Batson* claim.

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[12] TR pp. 58-59.

2. THE BRADY CLAIM

Velez contends (1) that the state had in its possession and failed to turn over the specifics of plea agreements with two of the state's key witnesses, Mermelstein and Uribe-Munera; (2) that the state had "access to or constructive possession of three prior inconsistent statements of witness, Uribe-Munera" (although Velez does not know the subject matter of the inconsistent statements); and (3) that he was not provided with the medical history of Uribe-Munera.

The scope of federal habeas relief for alleged *Brady* violations is narrow:

> Our concern as a habeas court is confined to reviewing for constitutional violations. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963). the prosecution must also disclose evidence useful for the defense for impeachment. *United States v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). A successful *Brady* claim must show (1) the prosecution's suppression of evidence, (2) the favorableness of that evidence, and (3) the materiality of that evidence. *United States v. Sink,* 586 F.2d 1041, 1051 (5th Cir.1978).
>
> The Supreme Court defined materiality in *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), According to *Bagley,*
>
> > Evidence is material only if there is a reasonable probability that, had the evidence

> > been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.
>
> *Id.* at 682, 105 S.Ct. at 3383 (Blackmun, J.); *id* at 685, 105 S.Ct. at 3385 (White, Jr., concurring in part). Writing for the Court, Justice Blackmun stated that "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.* at 678 105 S.Ct. at 3381.

Kyles v. Whitley, 5 F.3d 806, 811 (5th Cir.1993).

Although Velez asserts three *Brady* violations, he has failed to demonstrate either the fact of any alleged violation, or the materiality of the evidence allegedly withheld. As noted above, evidence is material only if there is a *reasonable probability* that the result of the trial would have been different had the evidence been disclosed to the defense. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

With respect to the plea agreements, Velez argues as follows:

> The State had knowledge of the specifics of the plea agreements of two critical witnesses, Mermelstein and Uribe-Munera. The State acknowledged that the plea agreements existed and provided defense counsel with a *general summary* of the plea agreements. The State refused to provide the actual and particulars of the plea agreements.

(Velez Memorandum, Rec. Doc. 2, p. 8).

The state contends that it turned over prior to trial "all immunity agreements of the witnesses and a listing of crimes immunized by these agreements. (FR vol.5 pp. 1211-1293)."[13] (State's Memorandum, *Valez* Rec. Doc. 18, p. 17).

On review, the Third Circuit found as follows:

> [Defendants] wanted more complete information on the crimes of Mermelstein and Uribe-Munera for which they have been granted immunity or leniency. The prosecutor insisted she had no more information than that which was already provided.
>
> The trial court herein determined that the prosecutor provided all of the information in her possession in good faith. As in *Seifert*, the trial court found the State's response to be "good and sufficient." 524 So.2d at 164. Accordingly, we find no error in the trial court's decision on these discovery matters. Nor do we find the defendants were prejudiced by the absence of the requested material.

State v. Velez, 588 So.2d at 130.

Velez offers nothing to the court on this issue other than his conclusory statements that the information at issue was withheld and would have changed the outcome of the trial. Accordingly, I conclude that the factual findings of the state courts are entitled to a presumption of correctness, and that the state turned over all *Brady* material on the plea agreements in question. I further conclude that Velez had failed to establish a *Brady* violation as a matter of law.

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[13] Two appellate records were lodged. Cites from the first record are indicated by "FR" and from the second record, by "SR," in accordance with the method of citation used by the parties.

Velez also contends the state withheld prior inconsistent statements and the medical history of an important witness, Uribe-Munera. Again, petitioner falls far short of establishing any *Brady* violation. the state responds that, "The State of Louisiana has *never* had any prior inconsistent statements of [Uribe-Munera]. This is a factually inaccurate allegation in which there is no basis, support, or evidence." (State's Memorandum, *Velez,* Rec. Doc. 18, p. 17). The state also contends that it "knew of no psychological records of Uribe-Munera until his testimony began." *Id.*

The Third Circuit found as follows:

> Concerning the specific evidence sought by the defendants, the State contends that it did not have possession, custody, or control of any of the requested information. The "long medical history" of Uribe-Munera is referred to in a brief medical summary which the State asserts was prepared by the United States Department of Justice. The Department of Justice never gave the complete medical history to the State and it was therefore never passed along to the defendants. Similarly, the prosecutor informed the trial judge that she was not in possession of the transcripts of certain FBI interrogations of Uribe-Munera. She had only summaries of Uribe-Munera's three statements which were

> given to defendants upon request for discovery of *Giglio* material.

State v. Velez, 588 So.2d at 130.

I find no basis in the record to conclude that any *Brady* violation occurred. Furthermore, habeas relief is simply unavailable on this claim absent the requisite showing that the outcome of the trial would have been different if the information had been turned over to the defense. This showing is not even on the horizon. Consequently, I determined that Velez is not entitled to relief on the *Brady* issue.

3. JURY NOTES

Velez contends that he was denied his Sixth Amendment right to a fair and impartial jury because the trial court refused to re-poll the jury, conduct an evidentiary hearing, or grant a new trial based upon a note sent to the judge by two jurors after the guilt phase of the trial and during the penalty phase. Cruz also raises this claim by adoption.

As discussed above under the section on exhaustion, I conclude that petitioners' claims as to a second juror note were not properly presented to the state courts for adjudication. In view of this finding, petitioners have requested that this claim be considered withdrawn in lieu of dismissing the entire habeas petition as a "mixed" petition. However, as noted above, if the court should conclude that the claim as to the second juror note has been adequately exhausted, the analysis on the merits is equally applicable to both notes, and habeas relief should accordingly be denied on the merits.

The guilty verdict was returned in the early afternoon of May 13, 1987. The jury was polled and verdict was found unanimous.[14] A short recess took place and the penalty phase began (SR Vol. 49, p. 12616). The jury continued to deliberate for several hours until the court adjourned for the evening. The next day, May 14, 1987, certain witnesses for the defense testified. At this point, a member or members of the jury handed the bailiff a note. The note was written by Ms. Hartnell and also signed by Ms. Shaw. The note read as follows:

> Your honor,
>
> I made a decision of 2nd degree murder but was told it had to be 1st degree murder because of money involved.
>
> What can I do? I feel I was coerced. I'm having a hard time living with 1st degree. Please tell me something.
>
> W. Hartnell

And I'm not the only one.

I, Edna Shaw, feel I was coerced in making a decision of 1st degree murder that I can not live with.

Edna Shaw

State v. Velez, 588 So.2d at 138, fn. 6. *See also* SR Vol. 49, p. 12684.

Defendants moved to re-poll the jury and to have an evidentiary hearing, both of which were denied based upon La.R.S.15:470[15], now codified at La.C.E.art. 606[16], which prohibits jurors from testifying about jury misconduct or any matter that may explain, qualify, or impeach a verdict.

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[14] Contrary to petitioner's contentions, the court polled the jury both orally and in writing. SR Vol. 49, pp. 12613-12616.

The state argues that the juror notes were probably prompted because the jury had recently heard the penalty-phase testimony of Mrs. Vasquez, mother of the petitioners' co-defendant, who emotionally testified that her son was studying to be a priest. The state cites other emotional testimony during the penalty phase which probably was related to the juror notes.

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[15] La.R.S.15:470 provided as follows:

> No juror, grand or petit, is competent to testify to his own or his fellows' misconduct, or to give evidence to explain, qualify or impeach any indictment or any verdict found by the body of which he is or was a member; but every juror, grand or petit, is a competent witness to rebut any attack upon the regularity of the conduct of the findings of the body of which he is or was a member.

[16] Article 606(B) of the Louisiana Code of Evidence provides as follows:

> **B. Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether any outside influence was improperly brought to the jury's attention. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

A full and complete analysis of this issue was undertaken by the Louisiana Third Circuit Court of Appeals. The court cited Louisiana case law and statutory authority for the proposition that, in the absence of evidence of jury tampering, an unauthorized communication, or a constitutional violation, courts are not to allow testimony from jurors regarding their deliberations, mental processes, or impeachment of a jury verdict. With regard to the factual underpinnings of the first juror note, the Third Circuit stated:

> In the case before us, the note giving rise to the controversy was given to the trial judge after an overnight recess, and during the penalty phase of the trial in which photographs of the defendants' families were shown to the jury, letters from family members were read into the record, and one defendant's mother and brother came from Columbia to testify in person. There is nothing in the record to indicate that outside influences may have had something to do with the jurors' second thoughts. In fact, counsel for Velez noted to the trial court that the jury had not been separated and had not been affected by any outside influence.

State v. Velez, 588 So.2d 116, 138-139.

The Third Circuit found no evidence of extraneous influence or coercion by a third person. I find that the defendants have been afforded a full and fair hearing on this issue and that the factual findings of the state courts must be accorded a presumption of correctness.

The Fifth Circuit is in accord with Louisiana jurisprudence on this issue. The Court instructs that inquiries directed at probing the mental processes of jurors, or of impeaching a jury's verdict, are improper. *See United States v. Martinez-Moncivais*, 14 F.3d 1030 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 72 (1994). In the latter case, the Fifth Circuit held that, "[o]utside of the narrow exception that arises when there is evidence of outside influences on a jury, a court should adhere to the common-law rule against admitting juror testimony to impeach a verdict." *Id.* at 1036, *citing McDonald v. Pless*, 238 U.S. 264, 267, 35 S.Ct. 783, 784, 59 L.Ed. 1300 (1915); *Hyde v. United States*, 225 U.S. 347, 384, 32 S.Ct. 793, 808, 56 L.Ed. 1114 (1912).

Accordingly, I conclude that petitioners are not entitled to habeas relief on this issue.

4. DENIAL OF REQUESTED JURY INSTRUCTION

The last issue presented is raised by petitioner Cruz, who alleges that the trial court erred in refusing to call witnesses regarding the unreliability of eyewitness identification, and in refusing to give a jury instruction on eyewitness identification. The trial court ruled that the charge proposed by Cruz "was adequately covered in the general charge . . . and possible prejudice would result in the court's pinpointing of a particular area of the evidence." (SR vol. 48, pp. 12602-12603).

The jury instruction given by the court was as follows:

> In evaluating the testimony of a witness, you may consider his or her ability and opportunity to observe and remember the matter about which he or she testified, his or her manner while testifying, any reason he or she may have for testifying in favor for or against the state or the defendant, and the extent to which the testimony is supported or contradicted by other evidence.

(Sr. Vol. 48, p. 12589).

As the Third Circuit noted, Cruz' proffered special jury charge was never submitted in writing, in violation of Louisiana Code of Criminal Procedure art. 807. *Velez, supra,* 588 So.2d at 136, fn. 5. However, since the Third Circuit reached the merits of this issue, it cannot be resolved on the basis of procedural default. Having reviewed the contention of the petitioner, and the analysis of the Third Circuit, I conclude that no error meriting habeas relief is presented.

Federal habeas relief for state prisoners is warranted only on grounds that the prisoner's confinement violates the Constitution, laws, or treaties of the United States, 28 U.S.C. § 2254(a) (1988). Habeas relief for constitutional trial errors must be granted only when the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 1714, 123 L.Ed.2d 353 (1993).

Trial errors which are not of constitutional magnitude are generally not cognizable in federal habeas proceedings, regardless of whether they constitute breaches of federal or state law. *Pulley v. Harris,* 465 U.S. 37, 41-42

(1984). General improprieties occurring at trial are cognizable only if they result in fundamental unfairness and thus violate the petitioner's Fourteenth Amendment right to due process. *Herrera v. Collins,* 113 S.Ct. 853, 866 (1993).

When a jury charge is at issue, the jury charge as a whole must be examined to see if the jury was misled and whether the defendant was prejudiced. *United States v. Bartlett,* 633 F.2d 1184 (5th Cir.), *cert. denied,* 454 U.S. 820, 102 S.Ct. 101, 70 L.Ed.2d 91 (1981); *Anderson v. Butler,* 23 F.3d 593, 598 (1st Cir.), *cert. denied,* 115 S.Ct. 331 (1994) (due process not violated by instructional error when error did not taint fundamental fairness of proceedings).

A review of the entire jury charge in this case reveals that the jury was not misled and that the petitioner suffered no prejudice from the trial court's refusal to give a special jury instruction on eyewitness testimony. Furthermore, the alleged error is not one of constitutional magnitude entitling Cruz to habeas relief.

CONCLUSION

For the foregoing reasons, I conclude that petitioners' grounds for habeas relief are without merit, and recommend that the petitions be DENIED.

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Rule 72(b), F.R.C.P., the parties have ten (10) days from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. Counsel are directed to furnish a courtesy copy of any objections or responses to the district judge at the time of filing.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within ten (10) days following the date of its service, or within the time frame authorized by Rule 6(b) F.R.C.P., shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. ***See Douglass v. United Services Automobile Association, 79 F.3d 1415 (5th Cir. 1996).***

Lafayette, Louisiana, this 18th day of July, 1996.

/s/ Mildred E. Methvin
Mildred E. Methvin
United States Magistrate Judge
705 Jefferson St., Suite 207
Lafayette, La. 70501
(318) 262-6651
262-6653 (FAX)

STATE of Louisiana

v.

Miguel VELEZ, Bernardo Vasquez, and Luis Carlos Quintero-Cruz.

No. CR90-230.

Court of Appeal of Louisiana,
Third Circuit.

Oct. 2, 1991.

Writ Denied Jan. 30, 1992.

Robert L. Moore, Moore & Rabin, P.A., Arthur Joel Berger, Miami, Fla., for Quintero-Cruz.

Janice Burton Sharpstein, Richard A. Sharpstein, Sharpstein and Sharpstein, Coconut Grove, Fla., for Velez.

Thomas L. Lorenzi, Lorenzi, & Sanchez, Lake Charles, for Vasquez.

Doug Moreau, Dist. Atty., Aaron Brooks, Premila Burns, Asst. Dist. Attys., Baton Rouge, for plaintiff-appellee.

Before DOMENGEAUX, C.J., and STOKER and LABORDE, JJ.

DOMENGEAUX, Chief Judge.

Defendants, Miguel Velez, Bernardo Antonio Vasquez, and Luis Carlos Quintero-Cruz, were charged by an East Baton Rouge Parish grand jury indictment with the first degree murder of Adler B. Seal, a violation of La.R.S. 14:30. Due to extensive pretrial publicity in Baton Rouge, a motion by defendants for change of venue was granted and the matter was transferred to the Fourteenth Judicial District Court in Calcasieu Parish. After a five week trial, the twelve person jury unanimously found each of the defendants guilty of first degree murder. At the penalty phase of the trial, the jury recommended that each of the defendants be sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. The trial court imposed sentence in accordance with the jury's determination. Defendants now appeal their convictions to this court. We will consider all assignments of error that have been briefed. Those which have not been briefed are considered abandoned. Uniform Rules, Courts of Appeal, Rule 2-12.4.

FACTS

On February 19, 1986, Adler B. "Barry" Seal was shot to death with machine gun fire in the parking lot of a Salvation Army halfway house in Baton Rouge. The facts and circumstances leading up to Seal's death appear in the record as follows:

Barry Seal was a pilot and drug smuggler for the Medellin Cartel, a Colombian cocaine enterprise. While employed by the Cartel, Seal flew numerous shipments of cocaine from Columbia to the United States, earning as much as $500,000 per flight. Seal, who was known to the members of the Medellin Cartel as McKenzie, was eventually arrested in connection with his drug smuggling activities. He was indicted in a Florida federal court, tried, convicted, and sentenced to 10 years in a federal prison.

Shortly after Seal was sentenced, he approached the Drug Enforcement Administration with a proposal to cooperate with the government as an informant. The federal government eventually decided to use Seal as an informant, agreeing to advise the sentencing judge of his cooperation at hearings on any motions for reduction of sentence. Pursuant to this agreement, Seal began working as a federal informant in March of 1984.

Richard Gregory, United States Attorney for the Southern District of Florida, testified that Barry Seal was vitally important to the prosecution of drug traffickers, to the extent that many convictions could not have been obtained without his testimony. As a result of Seal's cooperation, indictments were brought against Pablo Escobar and Jorge Ochoa, two of the top men in the Medellin Cartel. Shortly after these indictments were returned in July of 1984, Jorge Ochoa was arrested in Spain. Extradition procedures were begun and Seal provided the supporting affidavits which were filed in the Spanish courts.

In November of 1984, a documentary entitled "Uncle Sam Wants You" was produced and aired by WBRZ-TV in Baton Rouge. The documentary was prepared by investigative reporter John Camp and outlined Seal's experiences as a drug smuggler and federal informant.

Max Mermelstein, a former drug trafficker and member of the Medellin Cartel, testified that in December of 1984, he attended a meeting at the Miami home of Raphael Cardona-Salazar, another member of the Medellin Cartel. Also present at Cardona-Salazar's residence were the defendant, Miguel Velez (who is sometimes referred to in the record as "Cumbamba," the Spanish word for "chin"), an employee of Fabio Ochoa's named Cano, and several others. Fabio Ochoa had taken over the leadership of the Cartel after Jorge Ochoa was arrested in Spain. Away from the others, Mermelstein, Cardona-Salazar, and Cano watched a video of "Uncle Sam Wants You", and Mermelstein was instructed that he had been selected to take care of Barry Seal. Seal was to be kidnapped and returned to Columbia or killed outright. Either at this meeting or at a second meeting, Fabio Ochoa and Pablo Escobar were contacted by telephone, authorized the contract, and personally thanked Mermelstein for agreeing to take it on.

The price for kidnapping Seal was $1,000,000, while the price for murdering him was $500,000. Mermelstein was chosen to carry out the contract because he was American and would not be noticed in Baton Rouge the way Colombians would. He testified that he accepted the contract out of fear for the safety of himself and his family. Mermelstein was given expense money and a variety of information on Seal's residence, vehicles, restaurants which he frequented, and other personal matters. Pursuant to the contract, Mermelstein made three trips to Louisiana and was unable to locate Seal. He enlisted the help of two men, John Roberts and Bob Dragan, during his trips to Louisiana but was unsuccessful in carrying out the contract.

Mermelstein further testified that another meeting was held in February of 1985, during which discussions were had concerning the contract on Seal. Defendant Velez was present at this meeting. Cardona-Salazar said that he was being pressured by Pablo Escobar and the

Ochoas to have Seal eliminated as soon as possible. At the conclusion of this meeting, Velez expressed privately to Mermelstein his displeasure at not being included in the contract on Seal. He inquired as to the details of the contract and expressed interest in obtaining the contract for himself. Velez then stated that he would complete the contract even if it meant taking out Seal's wife and children in the process. Mermelstein advised Velez he had no authority to include him and that the only persons who could do so were Fabio Ochoa, Pablo Escobar, or Raphael Cardona-Salazar. Velez stated that he intended to approach them about being included in the contract, but Mermelstein did not state whether Velez had carried out his intention or if Velez had been given the necessary permission to take over the contract.

Mermelstein noted that Velez was the last person he saw in physical possession of the Mac-10 machine gun which Cardona-Salazar had previously test fired in Mermelstein's home, and which was later used to kill Seal.[1] Before Mermelstein was able to carry out the murder contract on Barry Seal's life, he was arrested for drug smuggling activities and became a government informant protected by the federal government's witness protection program.

Another government witness, Luis Carlos Uribe-Munera, associated with the Medellin Cartel for a number of years, testified that he was asked by a representative of the Ochoa family to go to the United States and kill someone. He did not know the proposed victim's name, but was told that he was the only person who could damage Jorge Ochoa after he was arrested in Spain. Uribe-Munera and another Colombian accepted the contract to kill this witness but later backed out. Shortly thereafter, Uribe-Munera's cohort was murdered and Uribe-Munera himself was shot five times. On cross-examination, Uribe-Munera admitted that he was a revolutionary terrorist and was addicted to crack cocaine or cocaine paste from 1969 until his arrest in 1986. He is currently serving time in a United States federal prison where he takes medication for numerous health problems.

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[1] Ballistics comparisons between slugs removed from the closet area of Mermelstein's home and those removed from Seal's Cadillac proved conclusively that they were fired from the same Mac-10 machine gun which was recovered from the getaway vehicle on the day of the killing.

Meanwhile, because of Barry Seal's cooperation with the federal government, his 10-year sentence in Florida was reduced to time served. Pursuant to his agreement with the federal government, Seal pleaded guilty to drug charges in a Louisiana federal court. Lewis Unglesby, Seal's attorney from 1984 until his death, testified that it was his understanding that the agreement provided that Seal could receive no harsher sentence in Louisiana than what the federal court in Florida had imposed.

At Seal's Louisiana sentencing, United States District Judge Polozola recognized Seal's agreement with the government but sentenced Seal to a term of probation, with the condition that he reside in a Baton Rouge Salvation Army halfway house for six months. Seal was required to report to the halfway house at 6:00 p.m. each day, spend the night, and leave the following morning at 7:00 a.m. On January 24, 1986, Barry Seal reported to the halfway house to begin serving his sentence. As feared by Seal's attorney, Seal was murdered three weeks later on February 19, 1986.

The evidence adduced at trial reveals the following activities of the defendants and certain unindicted and indicted coconspirators in the days surrounding the murder of Barry Seal. Airline, hotel, and car rental records indicate that on February 12, 1986, defendant Bernardo Antonio Vasquez took an Eastern Airlines flight from Miami to New Orleans and checked into the New Orleans Airport Hilton. He then rented an Oldsmobile from Avis for a period of seven days. Four days later, on February 16, 1986, defendant Miguel Velez arrived in New Orleans on an Eastern Airlines flight from Miami. Traveling with Velez were Heriberto Sanchez Cardenas and John Jairo Cardona Garcia. Upon arrival, Velez checked into the same Airport Hilton where Vasquez had registered four days earlier. That same day, Vasquez rented another vehicle, a Lincoln Town Car, this time from Budget Car Rental. Meanwhile, defendant Luis Carlos Quintero-Cruz had entered the United States illegally through Mexico. This was revealed by an immigration official who interviewed Cruz subsequent to his arrest.

Shortly after midnight, on February 17, 1986, Vasquez arrived at the Holiday Inn South in Baton Rouge. He was driving a Lincoln Town Car. Vasquez and a companion checked into the hotel and checked out several hours later prior to 8:00 a.m.

Between 2:00 a.m. and 3:00 a.m., also on February 17, Vasquez and his companion checked into the Jay Motel in Baton Rouge, located next to the Salvation Army halfway house where Barry Seal was serving his probation sentence. Photographs were introduced at trial which showed that Vasquez's room at the Jay Motel had a direct view of the Salvation Army parking lot where Barry Seal arrived and departed daily.

Vasquez returned to New Orleans later in the day, on February 17, and purchased a Buick Park Avenue automobile from Herman Cardenas at Toyota of Jefferson. He paid $6,500.00 cash for the car and purchased it in the name of his girlfriend, Mary Cook. Peter Ashooh, an FBI agent, ran checks on all of the information which Vasquez provided on Mary Cook, e.g., driver's license, social security number, address, and determined that none of the information was connected to anyone named Mary Cook.

Vasquez picked up the Buick from Toyota of Jefferson on the following day, accompanied by a heavy set, dark complexioned Hispanic male. Vasquez left in the rented Lincoln which he drove to the dealership while the Hispanic male took the Buick. The description of the person who was with Vasquez that day matches that of Jose Renteria Campo, who had checked into the New Orleans Airport Hilton earlier on February 18.[2]

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[2] The evidence suggested that Campo may have brought the Mac-10 machine gun which was used to kill Seal and the Uzi pistol found in the getaway vehicle from Miami to New Orleans. Campo borrowed an Uzi from Jose Countin, a firearms dealer in Miami, after inquiring about the purchase of several weapons. Campo never returned the Uzi which Countin had loaned him. Countin identified the Uzi found in the getaway vehicle as the same one which he had loaned to Campo. Countin also identified defendant Velez as having accompanied Campo to his store.

On February 18 and 19, Vasquez went to Anthony's Department Store in Kenner, Louisiana, and purchased a rain slicker, baseball caps, and luggage. He later returned and bought more clothing, including a plain western shirt. Two walkie-talkie radios were purchased for $341.00 cash at Radio Shack in Esplanade Mall in Kenner. The radios were purchased under the name Jose Lopez. One was found inside the getaway vehicle on the day of the murder. The fingerprints of Bernardo Vasquez were found on the batteries inside this radio.

Dennis Debate, an East Baton Rouge Parish sheriff's deputy, testified that on February 19, at approximately 5:45 p.m., he observed a late model Buick parked in the middle of the road adjacent to the Belmont Hotel, near the Salvation Army halfway house. An individual sat in the car wearing a red or orange baseball cap and a T-shirt, smoking a cigarette.

Shortly thereafter, at approximately 6:00 p.m., Barry Seal arrived at the Salvation Army. He backed his white Cadillac into a parking space and opened the driver's door. Before he could get out of his vehicle, however, a gunman jumped from behind the donation drop boxes and fired a .45 caliber Mac-10 machine gun. Seal died of multiple gunshot wounds to the head. The gunman ran to a waiting Buick which sped away from the Salvation Army.

Several eyewitnesses to the murder testified at trial. Robert Lane observed a vehicle with two men pull into a parking space near the drop boxes at the Salvation Army. Both men got out of the car and put items into the drop boxes, including a plaid article of clothing. (A new plaid shirt with straight pins still in it was recovered from one of the drops boxes at the Salvation Army.) Lane stated that the driver was taller than the passenger and wore scrub pants. The passenger was the gunman and was a shorter individual. Lane identified the vehicle which left the Salvation Army as a Buick Park Avenue. Lane also identified defendant Velez as the person who drove the getaway vehicle. Witnesses Colleen McGehee, Mitchel Orgeron, and Benny Louis identified defendant Luis Carlos Quintero-Cruz as the gunman. Witness Alvin Ricks stated that one of the individuals had a "Dick Tracy" chin. It was brought out at trial that Velez was nicknamed "Cumbamba" because of his protruding chin.

After the shooting, the men in the Buick raced from the parking lot and drove approximately three-tenths of a mile down the service road. They abandoned the Buick with the engine still running, got into a red Cadillac, and left the scene. The Mac-10 machine gun, along with an Uzi pistol, various quantities of ammunition, clothing from Anthony's Department Store, and a walkie-talkie radio with the power running, and other items, were recovered from the Buick. East Baton Rouge sheriff's deputies Hardy and Bonnette observed the switch from the Buick to the Cadillac. Both deputies testified that the men changed vehicles in great haste. Hardy testified the driver was taller than the passenger. Bonnette testified that the passenger looked like defendant Cruz, but could make no positive identification.

Fingerprints from the three defendants were found in both the Buick and the red Cadillac, which was recovered sometime later at the New Orleans Airport Parking Garage. The Cadillac had 162 miles elapsed from the time of rental. Evidence was introduced at trial to show this was the approximate mileage of a round trip between Baton Rouge and New Orleans.

Approximately one and one-half hours after the shooting, Jose Renteria Campo and Vasquez checked out of the New Orleans Airport Hilton. Velez attempted to get a flight out of New Orleans but was unable to do so. He was detained briefly at the airport by FBI agents, but released due to incomplete descriptions of the murder suspects. Velez then met Vasquez at the Hilton. Velez never checked out of the hotel, but rather, hired a taxicab to take him to Montgomery, Alabama. He paid a fare of $235.00 in cash. While en route to Alabama, Velez's taxi hit a deer near Meridian, Mississippi. He was arrested shortly thereafter, with the keys to the red Cadillac in his possession, along with cash and luggage containing scrub pants.

Meanwhile, Vasquez discussed with several witnesses the fact that he wanted to transport three illegal aliens from Colombia who had entered the country through Mexico. He told Gonzalo Jaramillo that one of them had already been stopped by immigration officials, and he pointed to an article concerning the Seal murder in the February 21, 1986 Times Picayune.

Vasquez was arrested at Gonzalo Jaramillo's residence on February 21. Prior to this he had been placed under surveillance by the FBI, based on a tip by Jaramillo. Agents observed Vasquez abandon the Lincoln Town Car in the parking lot of a New Orleans business called Gator Graphics. He was also observed placing a number of objects into a trash bin. Found in the trash bin by the FBI agents were the keys to the rented Lincoln, a pair of black knit gloves, a map from Avis Car Rental, a rental agreement in the name of Bernardo Vasquez which had been torn in half, and a baseball cap. After abandoning these items, Vasquez took a taxi to the general area of Jaramillo's home and walked to the residence. He left a short time later and went to a residence on Glasco Street where Cruz and Cardona Garcia had previously gone. He returned to Jaramillo's home where he was arrested a short time later.

Alberto Villada-Zapata testified that he picked up defendant Cruz and Cardona Garcia at Vasquez's request and transported them to 5825 Glasco Street. Cruz was later arrested at this residence in possession of over $3,000 cash, plus Mexican and British currency. Garcia was also arrested and found to be in possession of $2,000 cash.

All three defendants were found guilty of first degree murder based on the afore-mentioned testimony and evidence. They now appeal their convictions to this court.

Issue #1

BATSON CHALLENGE

By this assignment of error, defendants contend the trial judge improperly permitted race based exclusions of jurors effected through peremptory, challenges, even though the defendants and the excluded jurors did not share the same race.

Defendants are members of the Hispanic race. Throughout the jury selection process, defendants objected when the prosecutor exercised peremptory challenges to remove black venirepersons. Defendants urged their objections pursuant to the United States Supreme Court decision in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and La.C.Cr.P. art. 795 which prohibit the exercise of a peremptory challenge based solely on race.

The trial judge overruled the objections based on the *Batson* requirement that the defendant be a member of the same cognizable racial group as the excused juror. At the time of trial, there was sparse, if any, jurisprudence interpreting Article 795, and the trial judge declined to construe the article as any more broad than the *Batson* decision. Essentially, the trial court held the defendants did not have standing to object to the State's peremptory challenges of certain black venirepersons. Therefore, the trial judge did not determine whether defendants had made a prima facie showing of purposeful discrimination, and the State was not required to present neutral explanations for the disputed challenges.

Since the trial of this matter, the United States Supreme Court has expanded *Batson* to allow a criminal defendant to object to race based exclusions of jurors effected through peremptory challenges even if the defendant and the excluded juror do not share the same race. *Powers v. Ohio,* ___ U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). (*Batson* has likewise been extended to civil litigants. See *Edmonson v. Leesville Concrete Co., Inc.,* ___ U.S. ___, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991.))

Because *Batson* itself was applied retroactively as a constitutional rule of criminal procedure, see *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), any extension of *Batson* must likewise be given retroactive effect. See also *State v. Thompson,* 516 So.2d 349 (La. 1987), cert. denied, 488 U.S. 871, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988). Therefore, we must consider the facts of this case in light of the *Powers* decision.

The *Powers* case involved a white defendant who objected to the exclusion of black jurors. The court considered the specific question of whether such a defendant has standing to raise the equal protection rights of a juror improperly excluded from service. The court focused on the juror as the aggrieved party and discussed the criteria which must be evident before a litigant (in this case the criminal defendant), will be allowed to assert the rights of a third party (here, the juror):

> [T]he litigant must have suffered an "injury-in-fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute. *Singleton [v. Wulff,* 428 U.S. 106, 112, 96 S.Ct. 2868, 2873, 49 L.Ed.2d 826 (1976)]; the litigant must have a close relation to the third party, id., at 113-114, 96 S.Ct., at 2873-2874; and there must exist some hindrance to the third party's ability to protect his or her own interests. Id., at 115-116, 96 S.Ct. at 2874-2875. See also *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

111 S.Ct. at 1370-1371.

The *Powers* court determined that the discriminatory use of peremptory challenges causes a criminal defendant cognizable injury because such a practice jeopardizes the integrity and fairness of the judicial process. The defendant and the prospective juror have a close relation for purposes of the trial because the defendant seeks to establish a bond of trust with the juror from the initiation of voir dire through the sentencing phase of the trial. Finally, the *Powers* court noted that an excluded juror has little incentive to bring an action on his own behalf, and because of the defendant's similar interest in eliminating racial discrimination from the courtroom, the defendant would be a proper party to assert the juror's rights.

Because the *Powers* prosecutor had previously agreed to a remand in the event the standing issue would be resolved in the defendant's favor, the Supreme Court, through Justice Kennedy, made only the following brief comments on the question of what constitutes a prima facie showing of purposeful discrimination:

> The emphasis in *Batson* on racial identity between the defendant and the excused prospective juror is not inconsistent with our holding today that race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges. Racial identity between the defendant and the excused person might in some cases be the explanation for the prosecution's adoption of the forbidden stereotype, and if the alleged race bias takes this form, it may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred. But to say that the race of the defendant may be relevant to discerning bias in some cases does not mean that it will be a factor in others, for race prejudice stems from various

> causes and may manifest itself in different forms.
>
> It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice.

111 S.Ct. at 1373-1374.

According to this language, the existence of a racial identity between the defendant and the excluded juror is irrelevant to the defendant's standing to object to a peremptory challenge based on race. Rather, it is only one factor to be considered in determining whether the defendant has made a prima facie showing of discrimination. The *Batson* requirement that other relevant circumstances must be considered is still viable, and racial identity is only one of those circumstances. The defendant must always make a prima facie showing of discrimination before the prosecutor will be required to present neutral explanations for his peremptory challenges.

In the case before us, the trial judge overruled defendants' objections to some of the prosecutor's peremptory challenges on the basis that the defendants did not have standing to so object. Had the trial judge not based his decision on standing, but rather on the lack of a prima facie showing of discrimination, we hold, based on our review of the voir dire transcript, that the result would have been the same. We find, therefore, that the trial judge properly overruled the defendants' objections, not because of a lack of standing, but because of the absence of a prima facie showing of discrimination.

The record before us reveals the following circumstances. Over 300 venirepersons were interviewed during voir dire. The prosecutor was given 36 peremptory challenges and exercised 21 challenges on whites and 15 challenges on blacks.[3] The prosecutor asked similar questions of black and white prospective jurors and spent generally as much time questioning blacks as whites. Approximately eight blacks were excused because of reservations concerning the death penalty, just as numerous whites were excused for the same reason. One black female was seated on the jury and the prosecutor accepted a black who was excluded by defense counsel, both of which occurred before the State exhausted its peremptory challenges.

The defendants had no racial identity with the challenged jurors, although it is true they were all members of minority groups. The defendants were charged with first degree murder which requires a unanimous verdict, discounting an inference that the prosecutor may have allowed a minimum number of blacks on the jury because their votes may not ultimately count, such as in a noncapital case which requires the concurrence of only ten jurors for a guilty verdict.[4] Finally, we note the record reflects no pattern of strikes against blacks and no systematic exclusion of blacks from this jury. What we detect from the voir dire transcript is the prosecutor's preoccupation with seating jurors open to, and comfortable with, the death penalty, a characteristic she would have understandably desired for all jury members.

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[3] Our review of the record reveals the following black vinirepersons whose race was noted in the record and who were challenged by the State, over defense objections: Rious, Simmons, Broussard, Griffin, Pierfax, Charles Dugas, Batchan, Antonie, Hawkins, Cormier, Fontenot, and Dellafosse. Jurors Edward and Bellard were challenged without objection, and we can only surmise that they are black because of an oral listing given by the trial judge during the course of voir dire.

Our holding today is consistent with recent Louisiana jurisprudence interpreting *Batson* and its progeny. In *State v. Thompson,* supra, the Supreme Court applied *Batson* retroactively, reviewed the circumstances of voir dire, and concluded the defendant failed to establish a prima facie case of purposeful discrimination. In spite of the fact that the prosecutor exercised all of his peremptory challenges against blacks, the final jury consisted of four blacks and the State accepted three others who were excused by the defense. These seven blacks were accepted by the State before the prosecutor had exhausted all of his challenges. Additionally, the court found nothing in the prosecutor's questions during voir dire which would support an inference of a discriminatory purpose. In *State v. Collier,* 553 So.2d 815 (La.1989), the Supreme Court reversed and remanded for a new trial a case in which the prosecutor exercised eight peremptory challenges, and all challenged venirepersons were black, as was the defendant. The final jury composition was ten whites and two blacks, and the defendant was charged with a noncapital offense which requires the concurrence of only ten jurors. The trial court and the Supreme Court found these facts constituted a prima facie showing of discrimination; the trial judge was thereafter satisfied by the prosecutor's racially neutral explanation for each challenge, but the Supreme Court disagreed with the finding and remanded for a new trial.

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[4] This suggested inference is based on the unacceptable belief that all black jurors will vote on the basis of racial bias. See *State v. Collier,* 553 So.2d 815 (La.1989).

In *State v. Potter,* 578 So.2d 528 (La.App. 4th Cir.1991), the Fourth Circuit remanded for a *Batson* hearing after it determined that a prima facie showing of discrimination had been made because the prosecutor exercised 11 challenges, all against blacks, in the trial of a black criminal defendant. Conversely, in *State v. Cannon,* 572 So.2d 740 (La.App. 4th Cir. 1990), writ denied, 575 So.2d 821 (La.1991), the court affirmed the trial court's denial of the defendant's *Batson* objection after noting the 50-person venire was comprised of 37 blacks. The court pointed out, "Because of the overwhelming number of blacks on the venire, most of those being challenged had to be black and possibly all those presented as a prospective jurors were black." 572 So.2d at 742. The court held that no prima facie showing of purposeful discrimination was made in that case.

In *State v. Royal,* 527 So.2d 1083 (La.App. 1st Cir.1988), writ denied, 533 So.2d 15 (La.1988), the denial of defendant's *Batson* challenge was affirmed, and the court concluded that the State had legitimate reasons unrelated to race for excusing certain black potential jurors. Additionally, the court noted the relevant statistical circumstances: The defendant was black, three black jurors were seated, the first juror seated was black, and the prosecutor exercised five peremptory challenges to exclude white venirepersons. Similarly, in *State v. Simms,* 505 So.2d 981 (La.App. 3d Cir.1987), this court affirmed the denial of a *Batson* challenge by a black defendant, and noted the defendant had not met his burden of showing purposeful discrimination since one of the three jurors selected at the time of his *Batson* objection was a member of the black race.

The facts presented in this case do not establish a prima facie case of purposeful discrimination. We conclude, as did the *Thompson* court, the State did not exercise its peremptory challenges with a discriminatory purpose. Neither the voir dire transcript nor the numerical evidence concerning the prosecutor's challenges support such an inference; accordingly, the State was under no obligation to present racially neutral reasons for each peremptory challenge of a black venireperson. While it is true the trial judge incorrectly determined that defendants did not have standing to object under *Batson*, the trial judge ultimately did not err in denying defendants' motion for mistrial based on the State's exercise of its peremptory challenges against blacks because no prima facie showing of purposeful discrimination was made.

Issue # 2

OTHER CRIMES EVIDENCE

Defendants next contend the trial judge erred in allowing into evidence certain testimony concerning the illegal activities of the Medellin Cartel and testimony regarding the defendants' illegal possession of firearms. Specifically, defendants argue that much of the testimony of Mermelstein and Uribe-Munera was irrelevant, prejudicial, and inflammatory and constituted grounds for a mistrial. The evidence did not pertain to any of the defendants, yet prejudiced them to the extent that Velez was implicated as a member of the Cartel, and Vasquez and Cruz were joined to Velez as codefendants in the same trial. The firearms evidence did allegedly pertain to the defendants, but, they contend, it constitutes inadmissible other crimes evidence.

At the outset, we can dispose of the issue concerning the firearms evidence with minimal discussion. According to La.C.E. art 404 B(1), evidence of other crimes, wrongs, or acts is admissible when "it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding." This is the codification of the res gestae provision formerly enacted at La.R.S. 15:447-448. Evidence admissible under the res gestae exception to the general inadmissibility of other crimes evidence is not subject to any notice requirements. *State v. Prieur*, 277 So.2d 126 (La.1973).

The testimony of Robert Barns from the Bureau of Alcohol, Tobacco, and Firearms revealed that the Mac-10 machine gun found in the getaway car was illegal because it contained no serial number and was not registered with the United States government. This gun was used in the murder, of Barry Seal, and evidence of the defendants' possession of it is an integral part of the crime at issue herein. The Uzi identified by Jose Countin was likewise found in the getaway car and is therefore governed by the same rule.

The evidence relating to the Medellin Cartel and its various criminal activities is more problematic, but we find the trial judge did not err in failing to exclude it. The record shows that Mermelstein was associated with the Medellin Cartel and was responsible for the importation of 111,000 pounds of cocaine into the United States. The focus of Mermelstein's testimony was the formation of the initial contract to kill Barry Seal. However, in the course of explaining how the contract came to be, Mermelstein discussed the inner workings of the Cartel and the benefits of being a Cartel member; he also briefly outlined the cocaine exportation and distribution process and offered unsolicited testimony on crimes he had witnessed.

Uribe-Munera testified that he agreed to go to the United States and kill someone pursuant to a request by a Cartel representative. When he later backed out of the agreement, he was shot five times. This testimony was offered to show Uribe-Munera's involvement in the conspiracy to kill Barry Seal. However, in the course of explaining that involvement, Uribe-Munera testified to a virtual plethora of criminal activity associated with the Cartel. He described his participation in numerous murders in Colombia which included the killing of a judge, a doctor, and a mayor, and he discussed his involvement with well-known Colombians such as Carlos Lehder and the Ochoa family. He spoke of drug smuggling, kidnapping, illegal weapons possession, and forged travel documents. The challenged testimony of Mermelstein and Uribe-Munera was not connected to any defendant.

The State contends that all of the challenged evidence was relevant to prove the offeror's motive in this murder-for-hire case. The Cartel, as the offeror, wanted Barry Seal silenced because he was privy to the criminal activities of the Cartel as described by Mermelstein and Uribe-

Munera. The State also argued at trial that much of the challenged evidence was *Giglio* material, i.e., evidence relating to the credibility of prosecution witnesses, and should therefore be admissible. See *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

The Louisiana Supreme Court discussed the evidentiary requirement of relevancy in *State v. Franklin,* 353 So.2d 1315 (La.1977). In balancing the relevance or probative value of certain evidence, as defined by La.R.S. 15:441 (now codified at La.C.E. art. 401), with its potential for undue prejudice, a court must consider several factors: the danger that the evidence may unduly arouse the jury's emotions of prejudice, hostility, or sympathy; the probability that the evidence may create a collateral issue which will unduly distract the jury from the main issue; delay in the trial; and the danger of unfair surprise. 353 So.2d at 1322. The *Franklin* case involved evidence concerning the foreign source of heroin and how it is distributed in the United States. The court found the evidence was relevant and "the danger was slight that the jury could have drawn the prejudicial inference that Franklin himself had smuggled the heroin." 353 So.2d at 1323.

Similarly, in the case before us, we do not believe the testimony of Mermelstein or Uribe-Munera, which focused on the culpability of the Cartel as the offeror in this murder-for-hire case unduly prejudiced the jury against the defendants tried herein. Any hostility the jurors may have felt would have been directed against the Cartel as a group. Testimony concerning the existence and practices of the Cartel did not create a collateral issue; rather, the Cartel was described as an integral part of this contract killing. Finally, the testimony neither delayed the trial nor surprised the defendants, and the jury was not given the impression that the atrocities of the Cartel were committed by the defendants themselves.

Considering in particular the testimony of Max Mermelstein, we find his testimony was useful to the jury in several respects. It provided the motive for the contractual murder of Barry Seal under the State's theory of the case. Evidence of motive is relevant even though motive is not an element of the crime of first degree murder. Mermelstein's testimony set the stage for his own involvement in the initial Seal murder contract and explained how he came to be involved in the contract. It also explained why he is now a member of the federal witness protection program. Finally, the testimony served to describe and identify the Cartel and its leaders as a party to the murder-for-hire contract on Seal's life. the trial judge was careful to admonish the jury to disregard certain inadmissible comments offered by Mermelstein, and he cautioned the prosecutor several times that he would not let the testimony go too far.

Likewise, to the extent the testimony of Uribe-Munera may be considered prejudicial, it was relevant and admissible nonetheless. His testimony was offered primarily to show the existence of the murder-for-hire contract. His testimony supported the proposition that the Cartel was a party capable of, and interested in, putting out a contract on Seal's life. Furthermore, the strong cross examination of Uribe-Munera gave the jury a balanced perspective of the witness and his testimony.

While it is true the prosecutor offered the testimony in part to bolster the credibility of her witnesses, and to that extent constitutes *Giglio* material, we do not believe the provision of Louisiana law which prohibits the bolstering of a witness's credibility until after his credibility has been attacked has been violated. See La.C.E. art. 607(B). In addition to credibility, the evidence provided background information on these witnesses and the background for this murder, a relevant set of circumstances in almost any homicide prosecution. The trial judge did not err in failing to exclude the challenged testimony or in failing to grant a mistrial once the testimony had come into evidence.

Issue # 3

BRADY MATERIAL

The next issue raised by the defendants is the trial court's failure to require production by the State of certain evidence concerning two of the State's witnesses. Defendants sought production of the medical records of Uribe-Munera, certain inconsistent statements given by Uribe-Munera upon his arrest in the United States, and more extensive information concerning the plea bargains between any federal or state government entity and the State's witnesses, Uribe-Munera and Mermelstein. Defendants contend these witnesses were the only sources of proof regarding the contract to murder Barry Seal; therefore, a thorough assessment of their credibility with the benefit of the requested information was critical for purposes of impeachment on cross-examination.

The constitutional guarantee of due process requires the State, upon request, to produce evidence favorable to an accused when the evidence is material to either guilt or punishment. *Brady v. Maryland,*373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Evidence favorable to a defendant includes both exculpatory and impeachment evidence. *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense the result would have been different. *Giglio,* supra. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Rosiere,* 488 So.2d 965 (La.1986).

Under Louisiana law, the prosecution is not required to provide unlimited discovery. La.C.Cr.P. art, 723. However, the State must comply with the requirements of *Brady* and its progeny, and the provisions of the Code of Criminal Procedure pertaining to discovery in criminal cases. La.C.Cr.P. art 716 et seq.

La.C.Cr.P. art, 729.3 imposes on the State a continuing duty to disclose discoverable evidence, but a defendant's conviction may be reversed only if the State's noncompliance with discovery prejudiced the defendant. *State v. Johnson,* 544 So.2d 767 (La.App. 3d Cir.1989). Louisiana law further provides that the right to confrontation does not include a blanket right to pretrial disclosure of any and all information that might, by any stretch of the imagination, be useful in contradicting unfavorable testimony. *State v. Davis,* 562 So.2d 1173, at 1176 (La.App. 4th Cir.1990).

Concerning the specific evidence sought by the defendants, the State contends that it did not have possession, custody, or control of any of the requested information. The "long medical history" of Uribe-Munera is referred to in a brief medical summary which the State asserts was prepared by the United States Department of Justice. The Department of Justice never gave the complete medical history to the State and it was therefore never passed along to the defendants. Similarly, the prosecutor informed the trial judge that she was not in possession of the transcripts of certain FBI interrogations of Uribe-Munera. She had only summaries of Uribe-Munera's three statements which were given to defendants upon request for discovery of *Giglio* material.

We know of no duty or obligation which would require the State to obtain such information for the defendants' discovery purposes. For instance, Louisiana law clearly holds that the State has no duty to obtain rap sheets on its witnesses. See *State v Harvey*, 358 So.2d 1224 (La.1978); *State v. Seifert*, 524 So.2d 160 (La.App. 4th Cir.1988); and *State v. Vampran*, 491 So.2d 1356 (La.App. 1st Cir.1986), writ denied, 496 So.2d 347 (La.1986). Nor do we see how the requested information is material to the question of defendants' guilt in this case. Uribe-Munera's testimony concerned the existence of a contract on Barry Seal's life and the culpability of the Medellin Cartel and its leaders as parties to that contract. The credibility of his testimony does not directly affect the determination of guilt of the defendants tried herein.

Our analysis is similar concerning the plea bargain information sought by the defendants. They wanted more complete information on the crimes of Mermelstein and Uribe-Munera for which they have been granted immunity or leniency. The prosecutor insisted she had no more information than that which was already provided.

The trial court herein determined that the prosecutor provided all of the information in her possession in good faith. As in *Seifert,* the trial court found the State's response to be "good and sufficient." 524 So.2d at 164. Accordingly, we find no error in the trial court's decision on these discovery matters. Nor do we find the defendants were prejudiced by the absence of the requested material.

Issue # 4

POST ARREST STATEMENTS

The next issue we will address is assigned as error solely by defendant Vasquez. He contends the trial court erred in permitting the introduction of post arrest inculpatory statements obtained in violation of constitutional guarantees. He further complains of a comment made at trial by a witness for the State concerning his invocation of the right to remain silent.

We note initially that Vasquez did not timely file a motion to suppress inculpatory statements before or during the trial. This would ordinarily operate as a waiver of any alleged constitutional infirmities. *State v. Rios,* 528 So.2d 163 (La.App.3d Cir.1988), writ denied, 530 So.2d 83 (La.1988). However, defendant contends the failure of his attorney to file the proper motions constitutes ineffective assistance of counsel, thus entitling him to a new trial. A claim of ineffective assistance of counsel is more properly raised in a petition for post conviction relief; where, however, the record contains evidence necessary to decide the issue and the alleged ineffectiveness is raised on appeal by an assignment of error, the court should consider the claim. *State v. Heacox,* 543 So.2d 101 (La.App. 3d Cir.1989). We will therefore address Vasquez's contentions relating to his post arrest statements in an ineffective assistance of counsel context.

The Sixth and Fourteenth Amendments guarantee the defendant in a state criminal proceeding assistance of counsel for his defense. The United States Supreme Court has held that the right to counsel is the right to the effective assistance of counsel. *McMann v. Richardson,* 397 U.S. 759, at 771, 90 S.Ct. 1441 at 1449, 25 L.Ed.2d 763 (1970). In outlining the convicted defendant's burden of proof in an ineffective assistance case, the Supreme Court has established a two-part test. The defendant must show that a deficient performance on the part of his attorney prejudiced his defense. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The first prong of the test examines whether the attorney violated some duty to the client. The second prong of the test requires a showing of prejudice, resulting from defense counsel's deficient performance, without which the result of the proceedings would have been different. The defendant must show there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068.

We need not address whether counsel for Vasquez was deficient in the performance of his duties in this case because we find the failure to file the appropriate suppression motions did not prejudice Vasquez to the degree required by *Strickland* for a successful ineffective assistance claim. Before a confession or inculpatory statement can be introduced into evidence, the State has the burden of affirmatively proving that the statement was free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. La.R.S. 15:451. In the instant case, the record reflects that on each occasion in which Vasquez was interviewed by law enforcement officials, he was advised of his Miranda rights, both orally and in writing. There is no evidence that Vasquez was under the influence of coercion, duress, threats, or promises. Before each interview commenced, he signed a waiver of rights form. Michael Thompson, an investigator with the East Baton Rouge Parish District Attorney's Office, testified that when Vasquez was interviewed, he showed an ability to speak and understand the English language and conversed very well with law enforcement officials. There is nothing to indicate Vasquez did not understand his rights or the fact that he was waiving those rights by talking to the investigators.

Vasquez argues additionally that the post arrest statements should be suppressed because they were made subsequent to his invoking the right to counsel in violation of the rule articulated by the Supreme Court in *Edward v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The State responded in oral argument that the post arrest statements were initiated by Vasquez, giving rise to the one exception to the *Edward* rule of a suppression. The record contains no evidence on either side of this issue. We have nothing properly before us from which we can resolve this factual dispute.

The State provided the free and voluntary nature of the post arrest statements made by Vasquez. Therefore, any alleged deficiency in the performance of Vasquez's attorney stemming from his failure to file a motion to suppress did not result in prejudice sufficient to render that performance ineffective under *Strickland*. The trial judge did not err in permitting introduction of these post arrest inculpatory statements.

Vasquez next contends the trial court erred in failing to grant a mistrial or, at the very least to give a curative instruction to the jury after FBI special agent Jorge Fernandez commented on his invoking the post arrest right to remain silent. The comment appears in the record as follows:

> A. Towards the end of the interview being conducted by agent Presutti at which time Vasquez he [sic] indicated he didn't want to answer any further questions and I – and he then said he didn't understand English very well.
>
> MR. WALKER:
>
> Your Honor, objection. Can we approach the bench?
>
> THE COURT:
>
> Okay.
>
> MR. WALKER:
>
> I would make an objection at this time, Your Honor, and move for mistrial based upon the fact that this witness has indicated that my client has exercised his constitutional Fifth Amendment right.

Defendant Vasquez contends that the denial of a mistrial in this instance constitutes reversible error. We disagree.

This issue has been dealt with numerous times in Louisiana jurisprudence. In *State v. Smith*, 336 So.2d 867 (La.1976), a police officer who had interviewed the defendant testified that the defendant refused to give a statement to the officers. The defendant moved for mistrial but the trial court denied the motion, failed to give a cautionary instruction (though one would have been proper), and allowed the trial to continue. The Louisiana Supreme Court affirmed the trial court's ruling:

> After the objection was overruled, no other evidence or comment of the prosecutor in the record refers to the defendant's pre-trial silence. The trial as a whole was fairly conducted, the proof of guilt is strong, and the State made no use for impeachment of the defendant's custodial silence.
>
> We are therefore unwilling to hold that a mistrial is required because of the incidental and almost inadvertent (although improper) reference to the accused's custodial silence in two lines of a 101-page trial transcript, especially in the absence of any indication of the deliberate intent of the State to inject or exploit the issue (and also considering the uncertainty, until this opinion, of the Louisiana jurisprudence as to this precise issue).
>
> Although the issue is close, we thus for the reasons stated find no abuse of the trial court's discretion in its denial of a mistrial.

336 So.2d at 869-870.

In *State v. Kersey,* 406 So.2d 555 (La.1981), an officer who interviewed the defendant stated at trial that after giving a detailed statement, the defendant asserted his right to remain silent. The Louisiana Supreme Court found this did not constitute reversible error:

> In this case, however, the reference to defendant's post-arrest silence does not appear to be for the purpose of simply calling the jury's attention to it or having the jury make an inappropriate inference. When the objected to questioning is read in context with the rest of that officer's testimony, it is clear that the reference was made in an attempt to show that the entire statement made to the officers had been provided to the jury. According to the witness police officer, defendant was advised of his *Miranda* rights and then willingly answered a succession of questions. He made some statements that were exculpatory and some that were inculpatory in effect. The reference to defendant's post-arrest silence arose at the close of the officer's testimony and was more a way of exploring how the interrogation was concluded than an effort to call attention to the silence.

406 So.2d at 559.

In the case before us, Vasquez talked at length with officers concerning the Seal investigation before stating that he wished to stop the interview. The reference to the assertion by defendant Vasquez of his right to remain silent was followed immediately by the comment that he did not understand English thoroughly. This explanation or rationale provided a context within which Vasquez invoked his right to remain silent. The implication to the jury was that Vasquez found himself lost in the English conversation, not that he had anything to hide. While the trial judge certainly could have given a cautionary instruction in this instance, we do not believe the failure to do so, or the failure to grant a mistrial, was reversible error under these circumstances.

Issue #5

GUNSHOT RESIDUE TEST

The next assignment of error is raised solely by defendant Velez. He contends the trial court erred in denying his motion to suppress the results of a gunshot residue test which was performed upon him 13 hours after Barry Seal was murdered. The record in the instant case shows that after Velez was arrested, a neutron activation or gunshot residue test was performed during which Velez's hands were swabbed and tested for levels of antimony and barium. Velez registered high levels of barium, but extremely low antimony levels. Jim Churchman, a forensic scientist with the Louisiana State Police Crime Lab, explained that these tests are normally not conducted more than six hours after the firearm was allegedly handled or discharged due to dissipation of the particles on the person's hands which would make a positive test result unlikely even if the person had in fact handled or discharged a firearm.

Churchman stated that although the high barium levels on Velez's hands were suggestive evidence that he had handled or fired a weapon, he was unable to conclusively so state. Velez contends the results of the neutron activation test were highly unreliable and created prejudice sufficient to require a reversal.

Our Supreme Court has noted that scientific tests and expert opinions based thereon are admissible if the scientific principle is generally considered reliable and accurate by the scientific community. *State v. Boyer*, 406 So.2d 143 (La.1981). The *Boyer* court pointed out that neutron activation tests are the subject of widespread acceptance, but cautioned that a test is no more reliable than the person who conducts it.

The test in the instant case was conducted by Jim Churchman, who has conducted in excess of 500 neutron activation tests in his experience as a forensic scientist. He received training from the manufacturer of the test kits and from the Alcohol, Tobacco and Firearms Laboratory in Atlanta, Georgia. The record reflects Churchman was competent to conduct the test at issue herein.

Evidence which "tends to show the commission of the offense and the intent, or tends to negate the commission of the offense and the intent" is relevant. See formerly, La.R.S. 15:441 and the current rule now codified at La.C.E. art. 401 which states, " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Any evidence, whether direct or circumstantial, is relevant if it tends to prove or disprove the existence of a material fact. *State v. Williams*, 486 So.2d 889 (La.App. 1st Cir. 1986), writ denied, 489 So.2d 915 (La.1986).

The neutron activation test performed upon defendant Velez was inconclusive, but was nonetheless relevant and properly introduced at trial. An individual piece of evidence need not constitute proof positive of the material issue to be relevant and admissible. The evidence must simply have a tendency to make a consequential fact more or less probable. *State v. Ludwig,* 423 So.2d 1073 (La.1982).

The test in question suggested that Velez had recently handled a weapon. This evidence was not conclusive, however, and Velez's attorney was able to point out a number of factors attacking the significance of the test results. The jury was properly allowed the opportunity to weigh this evidence and evaluate its significance as they saw fit. Accordingly, we find no error in the trial court's denial of Velez's motion to suppress the results of the gunshot residue test.

Issue #6

IDENTIFICATIONS

Defendant Cruz assigns as error the trial court's refusal to allow the testimony of Dr. Gary Wells, a proffered expert on eyewitness identification. He also contends the trial court erred in refusing to hold an evidentiary hearing on the reliability and admissibility of the identification testimony of Benny Louis. Similarly, defendant Velez contends the trial court erred in allowing introduction of an identification by eyewitness Robert Lane.

The issue of expert testimony pertaining to eyewitness identification has previously been addressed by the *Louisiana Supreme Court in State v. Stucke,* 419 So.2d 939 (La.1982). That case contains a thorough review of jurisprudence concerning the acceptance or rejection of expert testimony in the area of eyewitness identification. The court cited cases from various state courts in which such expert testimony was offered and rejected at trial. The *Stucke* court affirmed the refusal of the trial court to allow testimony regarding eyewitness identification, and concluded:

> [T]he prejudicial effect of such testimony outweighs its probative value because of the substantial risk that the potential persuasive appearance of the expert witness will have a greater influence on the jury than the other evidence presented during the trial. Such testimony invades the province of the jury and usurps its function.

419 So.2d at 945. The holding of the Louisiana Supreme Court in *Stucke* represents the current state of the law on this issue in Louisiana. We decline to deviate from that rule.

Concerning the surprise identification of defendant Cruz at trial, the record reflects that Benny Louis testified concerning his memory of the shooting. He indicated that he was uncertain of his ability to identify anyone. Louis then concluded his testimony and left the courtroom. A short time later, after Louis met with a State investigator, he returned to the stand and identified Cruz as the shooter in the murder of Barry Seal. Counsel for both the defense and the prosecution were surprised by the identification.

The trial court granted defense counsel's request for a recess and excused the jury from the courtroom. At the conclusion of the recess, defense counsel questioned

Louis extensively concerning factors which could affect the reliability of his identification of Cruz.

The purpose of discovery rules in criminal trials is to eliminate unwarranted prejudice from surprise trial testimony. *State v. Toomer,* 395 So.2d 1320 (La.1981). However, these rules will not allow a defendant to exclude testimony solely because it comes as a surprise to him. Although La.C.Cr.P. art. 729.3 imposes a continuing duty upon the prosecution to disclose additional evidence to the defense when it discovers same, the State is under no duty to disclose information which it does not possess. *State v. Williams,* 448 So.2d 659 (La.1984). Therefore, exclusion of evidence is a sanction which is not available when the State has uncovered evidence at an inopportune time for the defense. *Williams.* Because the prosecutor did not learn of Louis' ability to identify Cruz until after Louis was recalled to the stand, the State did not have possession of this information in sufficient time to disclose it to defense counsel. Therefore, the trial court did not err in refusing to exclude this testimony based on surprise.

Cruz next contends the identification was tainted by contamination from pretrial publicity and a discussion with a State investigator. A defendant who seeks to suppress an identification must prove that the identification was suggestive and that there was a likelihood of misidentification in the identification procedure. *State v. Lowenfield,* 495 So.2d 1245 (La.1985), cert. denied, 476 U.S. 1153, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986); *State v. Prudholm,* 446 So.2d 729 (La.1984). Defendant did not prove the identification was suggestive, nor did he establish a likelihood of misidentification in this instance. His cross examination of Louis was extensive and thorough, and the particulars concerning reliability brought out at that time must go to the weight, rather than the admissibility, of Louis's in-court identification.

Cruz also argues the trial court erred in failing to conduct an evidentiary hearing on the admissibility of Louis' identification. However, the record does not indicate that Cruz requested such a hearing at trial. An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. La.C.Cr.P. art. 841. Since defense counsel never requested an evidentiary hearing, any alleged error in this regard cannot be asserted on appeal.

We now consider Velez's argument concerning the identification by Robert Lane. Velez contends that because Lane was shown a passport photograph of Velez prior to his viewing a lineup, the identification at the lineup was unduly suggestive. In accordance with the rule of *Lowenfield* and *Prudholm,* Velez argues the identification was suggestive and resulted in a likelihood of misidentification. The facts suggest otherwise. Lane testified that he observed the individuals at the murder scene for seven to ten minutes. He further described the driver as tall and wearing scrub pants, consistent with an accurate description of Velez. In addition, Lane made an in-court identification of Velez independent of the lineup. Considering these facts, the suggestive nature of Lane's identification goes to the weight, rather than the admissibility of the identification. Further, we find no proof of a likelihood of misidentification.

Accordingly, we find no error in the trial court's refusal to exclude or suppress the identifications by Robert Lane and Benny Louis. Nor did the trial court err in disallowing the expert testimony of Dr. Gary Wells.

Issue #7

JURY CHARGE OBJECTION

Defendants Vasquez and Cruz allege the trial court erred in not providing a transcript of the jury charge conference at which the defense unsuccessfully argued entitlement to a special instruction on identification by an eyewitness. The charge conference is not contained in the record on appeal. Because of this omission, defendants contend they cannot present their argument as to why they were entitled to this special jury instruction. From the arguments of counsel and the record before us, we are unable to discern whether the charge conference was recorded and simply not transcribed, or whether it was not recorded at all.

Defendants have the burden of making a contemporaneous objection concerning any portion of the record which may not have been transcribed and lodged with the appellate court. Since defendants did not timely object, they cannot complain of the trial court's failure to provide a transcript of the jury charge conference.

If, on the other hand, the charge conference was not recorded, we must look to the requirements of La.C.Cr.P. art. 843 which provides:

> In felony cases . . . , the clerk or court stenographer shall record all of the proceedings, including the examination of prospective jurors, the

> testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements, and arguments of counsel.

Although Article 843 does require a full recording of every felony trial, our jurisprudence has held that an inconsequential omission from a record which is immaterial to a proper determination of the appeal does not require reversal of a conviction. *State v. Johnson*, 438 So.2d 1091 (La.1983); *State v. Richardson*, 529 So.2d 1301 (La.App. 3d Cir.1988), writ denied, 538 So.2d 587 (La.1989). The inconsequential omission in *Johnson* was counsel's argument on the introduction of a hearsay statement, while in *Richardson*, the omission included the arguments of all counsel and the trial judge's reasons for ruling on each objection made at trial.

Similarly, in the case before us, the jury charge conference contained the arguments of counsel and the trial judge's reasons for ruling on the defendant's request for a special charge on the subject of eyewitness identification. We find the failure to record this conference is an inconsequential omission immaterial to a proper determination of the issue at hand. The defendants formally objected on the record to the absence of their requested special charge, and the trial judge overruled their objection, with reasons, on the record.

We now consider defendants' related assignment of error, that the trial court erred in denying their request for a special jury instruction regarding factors that the jury must consider when evaluating the testimony of the witnesses who identified them.[5]

Defendants argue their entire defense was predicated on misidentification by the State's eyewitnesses. Defendants claim the jury knew what the issue was, but was left with no guidance to evaluate the sole defense of misidentification. The following charge was given to the jury by the trial judge:

> As the sole judges of the credibility of witnesses and of the weight their testimony deserves, you should scrutinize carefully the testimony and the circumstances under which the witness has testified.
>
> In evaluating the testimony of a witness, you may consider his or her ability and opportunity to observe and remember the matter about which he or she testified, his or her manner while testifying, any reason he or she may have for testifying in favor for or against the State or the defendant, and the extent to which the testimony is supported or contradicted by other evidence.

After the jury instructions had been given, defense counsel objected to the court's failure to give a special jury instruction regarding eyewitness testimony. The trial judge overruled defendants' objection and stated:

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[5] We will consider this issue given our analysis concerning the recordation of the jury charge conference, even though the defendants have not complied with the requirement of La.C.Cr.P. art. 807 that a proffered special charge must be in writing.

> Let the Record reflect that the charge in the Court's opinion was adequately covered in the general charge and thus the reason for not wanting to do so is because of possible prejudice would result in the Court's pinpointing a particular area of the evidence.

La.C.Cr.P. art. 807 provides that a requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given.

The instructions given in this case are very similar to instructions given in other cases involving the defense of misidentification. In *State v. Foy*, 439 So.2d 433 (La.1983), the trial judge instructed the jury that as the sole judges of the weight and credibility of witnesses, they should scrutinize the circumstances under which the witnesses testified, their manner while testifying, and their ability and opportunity to remember. Additionally, the judge told the jury to consider any reason the witnesses may have for testifying in favor of or against the State or the defendant, and the extent to which the testimony is supported or contradicted by other evidence. In finding the judge had properly instructed the jury, the court stated, "to have given the requested special charges on the identification issue would have improperly pinpointed this issue out of proportion with others in the case." *Foy*, 439 So.2d at 437. See also *State v. Stewart*, 357 So.2d 1111 (La.1978).

Defendants cite *State v. Hills*, 241 La.345, 129 So.2d 12 (1960) (on rehearing), in support of their argument that where the sole defense is misidentification, the trial court should give a special charge on the subject. However, in *Hills*, the matter of identification was not covered or even referred to in the general charge. The Supreme Court concluded that such a charge should be included in the main charge, as was the case herein.

Defendants also contend the general jury charge was inadequate when compared to the charge given in *State v. Wiggins*, 556 So.2d 622 (La.App. 5th Cir.1990). In Wiggins, the judge instructed the jury to consider how much time had passed between the crime and the first identification by the witnesses, and whether the witnesses seemed certain at the time of the first identification and again when they testified in court. The appellate court found the charge satisfactorily instructed the jury on the State's burden of proving the defendant's identity, and that the defendant's requested charge was fully incorporated therein. While it is true that the charge given herein is not identical to the *Wiggins* charge, it was sufficient nonetheless. Unlike the *Wiggins* jury, the jury in the present case was instructed to consider the witnesses' reasons for testifying, manner while testifying, and whether their testimony is supported or contradicted by other evidence. Accordingly, we find no error in the jury charges given in this case, or in the trial court's failure to include defendants' requested charge on eyewitness identification testimony.

Issue #8

SEVERANCE

Defendants Vasquez and Cruz assign as error the trial court's refusal to grant them a severance from defendant Velez. Only Vasquez has briefed the issue. Vasquez contends he was entitled to a severance when the State introduced other crimes evidence through witnesses Max Mermelstein and Luis Carlos Uribe-Munera which was in no way connected to him. Vasquez further contends that a severance was required because of antagonistic defenses among the defendants and the radically different role which he allegedly played in the charged offense as opposed to codefendants Cruz and Velez.

La.C.Cr.P. art. 704 provides:

> Jointly indicted defendants shall be tried jointly unless:
>
> (1) the state elects to try them separately; or
>
> (2) the court, on motion of the defendant, and after a contradictory hearing with the district attorney, is satisfied that justice requires a severance.

When a defendant moves to sever, the defendant carries the burden of proving that a severance is required. *State v. Bradford*, 367 So.2d 745 (La.1978). In *State v. McGraw*, 366 So.2d 1278 (La.1978), the court pointed out that persons jointly indicted are not entitled to a severance of trial as a matter of right, but rather, the grant or denial of a motion for severance lies within the discretion of the trial judge whose ruling will not be interfered with unless exercised arbitrarily or to the prejudice of the accused. *McGraw*, 366 So.2d at 1283. The *McGraw* court went on to explain that the mere allegation of antagonistic defenses is insufficient, as an accused must show actual prejudice resulting from a joint trial. Furthermore, the actual prejudice standard requires a showing that defendant would probably not have been convicted had he been accorded a separate trial.

The denial of a severance to defendant Vasquez was not error. Under the actual prejudice standard outlined in *McGraw*, Vasquez failed to show that he probably would not have been convicted if accorded a separate trial. The record contains substantial competent evidence of Vasquez's guilt, independent of any "guilt by association" implication which may have arguably come from the testimony of Mermelstein and Uribe-Munera. This evidence included, but was not limited to, fingerprint evidence, hotel, airline, and rental car records, inculpatory actions and statements, and certain purchases made just prior to the murder of items used in connection with the murder.

Vasquez also contends a severance was required because of antagonistic defenses among the defendants and the radically different role which he played in the alleged offense. We note first that defendants did not have antagonistic defenses within the meaning of *McGraw*, as none of the three intended to cast blame upon the others. Furthermore, justice does not require severance where only the extent of participation of each defendant is at issue. *State v. Gaskin*, 412 So.2d 1007 (La.1982); *State v. Simmons*, 381 So.2d 803 (La.1980), cert. denied, 449 U.S. 1036, 101 S.Ct. 612, 66 L.Ed.2d 498 (1980). As in *Gaskin* and *Simmons*, the evidence adduced herein indicates all three defendants were culpable as principals.

The fact that each defendant's role in the crime may have differed slightly or radically from the others is of no significance. Accordingly, we hold the denial of Vasquez's motion to sever did not constitute reversible error.

Issue #9

JURY MISCONDUCT

Velez, Vasquez, and Cruz next assign as error the trial court's denial of their motion to repoll the jury, conduct an evidentiary hearing, or grant a new trial based on an invalid verdict. Defendants contend that a note sent to the judge by two jurors, after the guilt phase of the trial and during the penalty phase, reflects an invalid verdict.[6]

Defendants were charged with first degree murder, which is a capital offense and requires a unanimous verdict. La.C.Cr.P. 782. After the verdict of guilty was returned, the trial judge asked the jury if this was their verdict and also asked if it was by unanimous vote. The jurors responded affirmatively as a group to both questions. The jury was then polled in writing, and unanimity was confirmed by the judge, clerk, and counsel.

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[6] The note read as follows:

> Your Honor,
>
> I made a decision of 2nd degree murder but was told it had to be 1st degree murder because of money involved. What can I do? I feel I was coerced. I'm having a hard time living with 1st degree. Please tell me something.
>
> W. Hartnell
>
> And I'm not the only one. I, Edna Shaw, feel that I was coerced in making a decision of 1st degree murder that I can not live with.
>
> Edna Shaw.

The following morning, when the note was given to the trial judge, defendants moved to repoll the jury and requested an evidentiary hearing, both of which were denied. The ruling was based on La.R.S. 15:470, now codified at La.C.E. art. 606, which prohibits a juror from testifying about jury misconduct or any matter that may explain, qualify, or impeach a verdict.

Our courts are required to take evidence upon well pleaded allegations of prejudicial juror misconduct which violates an accused's constitutional rights to due process, to confront and cross-examine witnesses, and to a trial by a fair and impartial jury. Upon a showing that a constitutional violation occurred and that a reasonable possibility of prejudice exists, a court must set aside a verdict and order a new trial. *State v. Graham*, 422 So.2d 123 (La.1982), appeal dismissed, 461 U.S. 950, 103 S.Ct. 2419, 77 L.Ed.2d 1309 (1983); *State v. Sinegal*, 393 So.2d 684 (La.1981). Furthermore, an exception to the rule of La.R.S. 15:470 exists when an unauthorized communication or act by a third person creates an extraneous influence on the jury. *State v. Copeland*, 419 So.2d 899 (La.1982), cert. denied, 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989); *Sinegal*. In *Sinegal*, the jury was exposed to an incorrect statement of law from a 1916 law book. In reversing the defendant's conviction, the Supreme Court held that a new trial is mandated when there is a reasonable possibility that extraneous information considered by the jury affected its verdict. 393 So.2d at 686.

Conversely, jurors are not competent to testify about their deliberations or the mental processes of the jurors during deliberations. *Acosta v. Pendleton Memorial Methodist Hospital,* 545 So.2d 1053 (La.App. 4th Cir.1989), writs denied, 551 So.2d 637, 638 (La.1989). In *State v. Abney,* 347 So.2d 498 (La.1977) the Supreme Court cited La.R.S. 15:470 and stated:

> [N]o juror is competent to impeach the verdict of the jury on which he served. The rule is founded on the public interest in finality of jury verdicts and in encouraging frankness of discussion among jurors in their deliberations. *State v. Ledet,* 298 So.2d 761 (La.1974). This firmly established rule prevents jurors from impeaching their verdict by disclosure of jury deliberations or even by testimony of misconduct within the jury room. *State v. Durr,* 343 So.2d 1004 (La.1977).

347 So.2d at 502.

In the case before us, the note giving rise to this controversy was given to the trial judge after an overnight recess, and during the penalty phase of the trial in which photographs of the defendants' families were shown to the jury, letters from family members were read into the record, and one defendant's mother and brother came from Columbia to testify in person. There is nothing in the record to indicate that outside influences may have had something to do with the jurors' second thoughts. In fact, counsel for Velez noted to the trial court that the jury had not been separated and had not been affected by any outside influence.

The trial judge found the note indicated a second thoughts situation, merely a feeling by the two jurors in question, after thinking about their verdict. He did not believe the note in any way affected the validity or legality of the verdict or the constitutional rights of the accused. The trial judge stated, "Our system cannot operate upon second thoughts. We have to have a final adjudication. It has to be final."

Our review of the record indicates the note was sent to the judge the day after the jury unanimously found defendants guilty. After the foreman read the verdict, the judge polled the jury orally as a group and individually in writing. There is no evidence of extraneous influence or coercion by a third person. We find, as did the trial judge, that the defendants' constitutional rights were not jeopardized. The defendants therefore were not entitled to an evidentiary hearing on jury misconduct or a new trial. The matter was within the trial court's discretion and we find, on review, no abuse of that discretion. The trial judge's ruling is affirmed.

Issue #10

ELEMENTS OF THE CRIME

Finally, defendants Velez and Vasquez contend the evidence adduced at trial was insufficient to support their first degree murder convictions. Defendant Cruz raised the issue as an assignment of error but did not brief or argue it in this appeal.

Louisiana law provides that when the issue of sufficiency of evidence is raised on appeal, the critical inquiry of the reviewing court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of the fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State ex rel. Graffagnino v. King*, 436 So.2d 559 (La.1983). It is the role of the factfinder to weigh the respective credibilities of the witnesses, and this court will not second-guess the credibility determinations of the trier of fact beyond the sufficiency evaluations required by law.

In order for the State to obtain a first degree murder conviction, it must prove the essential elements of first degree murder beyond a reasonable doubt. In this case, the State sought convictions under paragraph 4 of La.R.S. 14:30 which reads:

> A. First degree murder is the killing of a human being:
>
> * * *
>
> (4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

According to this statute, the elements which must be proven beyond a reasonable doubt are the killing of a human being, the specific intent to kill or inflict great bodily harm, and the offer or exchange of something of value for the killing.[7]

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[7] La.R.S. 14:10 defines specific intent as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow

When the evidence against defendant Velez is viewed in the light most favorable to the prosecution, we find Velez's first degree murder conviction must stand. Velez was present at a meeting where the murder of Barry Seal was discussed. He knew of the Medellin Cartel's reasons for wanting Seal dead, as well as the amount of money which would be paid to whoever completed the contract. At subsequent meetings, Velez expressed his interest in the contract on Seal's life, stating the he would complete the contract even if it meant killing Seal's wife and children in the process. The fingerprints of Velez were found in both vehicles connected to the murder. Additionally, Velez was placed at the murder scene by two eyewitnesses, Robert Lane and Alvin Ricks. The actions of Velez following the shooting are also indicative of guilt. Velez never checked out of the Airport Hilton, but hired a taxi to transport him to Montgomery, Alabama. He was arrested in Meridian, Mississippi after his taxi hit a deer. In his possession were the keys to the getaway car, approximately $3,000 in cash, and luggage containing scrub pants. Eyewitness Robert Lane testified that the driver of the murder vehicle, whom he identified as Velez, wore scrub pants at the time of the murder.

After viewing all of this evidence in the light most favorable to the prosecution, we conclude any rational trier of fact could have found the elements of first degree murder were proven as to defendant Velez beyond a

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his act or failure to act." Specific intent is a state of mind and need not be proven as fact, but rather, it may be inferred from the circumstances of the crime and the actions of the defendant. *State v. Graham*, 420 So.2d 1126 (La.1982).

reasonable doubt. The fact that a killing occurred is not disputed; Velez's actions reflect his specific intent to kill the victim; and Velez, the jury could have reasonably concluded, was offered something of value for the killing, which offer he accepted. Velez was therefore properly convicted of first degree murder and sentenced accordingly.

We next consider the evidence presented against defendant Vasquez. The actions of Vasquez were tailored toward the successful completion of the murder of Barry Seal. He obtained the murder vehicle and the getaway car, as evidenced by car rental agreements and testimony. Vasquez arrived in Louisiana one week before Seal was murdered. During this week he checked into three different hotels, one located adjacent to and with a direct view of the Salvation Army halfway house where Barry Seal reported daily. Vasquez provided false information when he purchased the car which was used in the murder. He purchased clothing from a department store, which clothing was later used as props in the murder. Vasquez's fingerprints were found on the batteries inside a walkie-talkie which was found in the murder vehicle.

Within an hour and a half of the murder, Vasquez checked out of the Airport Hilton in New Orleans. While under FBI surveillance, he abandoned a rented Lincoln and threw the keys, a rental agreement, a road map, black knit gloves, and a baseball cap into a dumpster. During post arrest interviews, Vasquez contradicted himself on numerous occasions. He denied ever having rented the red Cadillac, used as the getaway car, and became angry and teary eyed when confronted with a rental agreement in his name. He later admitted renting the car, but denied any knowledge of the walkie-talkies used during the murder. When confronted with the fact that his fingerprints were found on the batteries inside the walkie-talkies, he ultimately admitted purchasing the batteries and testing the radios.

This evidence reflects Vasquez's specific intent to kill Barry Seal. His participation in the murder was significant and his actions represent that of a principal to the murder. The evidence does not, however, prove the offer or exchange of anything of value for the killing as to Vasquez. Vasquez did not enter the picture until February 12, 1986, approximately one week before the murder. The State offered no proof of a connection between the Cartel's contract, or offer, and Vasquez. Proof of a codefendant's connection to the contract (Velez), or the fact that $860 in cash was found on Vasquez when he was arrested (when the alleged bounty was $500,000), is not enough to prove beyond a reasonable doubt that Vasquez was acting pursuant to the contract on Seal's life. Therefore, we cannot affirm the first degree murder conviction of defendant Vasquez.

The evidence and testimony in this record do not provide reasonable support for the apparent conclusion that because the three defendants were acting together, they were all three part of the murder contract put out on Seal's life. The offer or exchange of something of value was an essential element of the offense charged herein which the prosecutor was required to prove with competent evidence. In fact, no evidence whatsoever was offered to link Vasquez to the murder contract. Velez was linked to the contract by the testimony of Max Mermelstein whom the jury apparently found to be a credible witness. The State proved that a contract did exist and that Velez was acting pursuant to that contract. On the other hand, the State did not attempt to prove, and we cannot infer, that Vasquez was likewise acting pursuant to that contract.

In *State v. Bay*, 529 So.2d 845 (La.1988), the State sought a first degree murder conviction based on a murder-for-hire contract. The Supreme Court found the evidence of such a contract to be uncorroborated and not credible and reversed the defendant's conviction. In the case before us, we have found no evidence of such a contract as to defendant Vasquez.

In determining the proper remedy for the erroneous conviction of Vasquez, we must consider Louisiana jurisprudence on the subject of principals and the relationship of multiple defendants in a trial.

Neither the law of principals nor the law of conspiracy can provide the legal basis to support the first degree murder conviction of Vasquez. First, the State did not attempt to prove defendants were acting pursuant to a conspiracy; they were neither tried nor convicted of the crime of conspiracy.

The defendants were, however, tried and convicted as principals in the murder of Barry Seal pursuant to La.R.S. 14:24, which provides:

> All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

However, merely because each defendant may be a principal along with other principals does not mean that proof of the requisite elements of the crime against one principal constitutes proof of the same elements against other principals.

In *State v. Francis*, 486 So.2d 346 (La.App. 3d Cir.1986), writ denied, 492 So.2d 1216 (La.1986), this court found sufficient proof of the requisite specific criminal intent, on the part of the defendant, to kill or inflict great bodily harm on the victim. The defendant was properly convicted as a principal in the second degree murder committed by him and another principal. The court noted that both principals had the requisite specific criminal intent. Similarly, in *State v. Clay*, 441 So.2d 1227 (La.App. 1st Cir.1983), writ denied, 446 So.2d 1213 (La.1983), the defendant was convicted of second degree murder even though the victim was physically murdered by another individual. The court held:

> One who aids or abets in the commission of a crime may be charged and convicted with a higher or lower degree of crime, depending upon the mental element proved at trial. *State v. Watson*, 397 So.2d 1337 (La.1981), cert. denied, 454 U.S. 903, 102 S.Ct. 410, 70 L.Ed.2d 222 (1981).

441 So.2d at 1234.

In *State v. West*, 568 So.2d 1019 (La.1990), the court found the trial judge's jury instructions to be erroneous because the jury was not told it had to find specific intent on the part of this defendant in order to convict this defendant where his two co-perpetrators had previously been convicted of first degree murder. The Supreme

Court determined the improper instruction could have led a reasonable juror to believe erroneously that he could transfer the mental state of the defendant's co-perpetrators to the defendant, and thus satisfy the specific intent requirement needed to convict the defendant of first degree murder. 568 So.2d at 1025.

Both *State v. Watson*, 529 So.2d 94 (La.App. 4th Cir.1988), writ denied, 535 So.2d 740 (La.1989), and *State v. Smith*, 450 So.2d 714 (La.App. 4th Cir.1984) involved the use of weapons by one of two codefendants. In Watson, an armed robbery and aggravated rape case, the evidence showed that one defendant carried a gun from the beginning of the encounter with the victim, fired a shot from the gun, and held it to the victim's head while the second defendant raped her. The jury could have reasonably concluded that the second defendant knew of the gun and therefore aided in the commission of the aggravated rape. 529 So.2d at 98. By contrast, in *Smith*, one defendant's armed robbery conviction was reduced to simple robbery because there was no evidence he knew of his codefendant's impulsive decision to pick up and use a hammer during the course of the robbery.

Given this jurisprudence, we cannot affirm Vasquez's first degree murder conviction. We need not, however, discharge him. The discharge of the defendant is neither necessary nor proper when the evidence supports a conviction on a lesser and included offense which was a legislatively authorized responsive verdict. *State v. Byrd*, 385 So.2d 248 (La.1980). See also *Bay*, supra; *State v. Jones*, 426 So.2d 1323 (La.1983); and *State v. Nugent*, 580 So.2d 1002 (La.App. 3d Cir.1991). The evidence does support a guilty verdict of the lesser and included offense of second degree murder and we will order entry of judgment against Vasquez in accordance therewith.

We will not review the sufficiency of the evidence offered against defendant Cruz as he abandoned this assignment of error.

DECREE

For the foregoing reasons, we affirm the convictions and sentences of Miguel Velez and Luis Carlos Quintero-Cruz. We set aside the conviction and sentence of Bernardo Antonio Vasquez and remand to the district court for entry of judgment of guilty of second degree murder and resentencing in accordance with La.R.S. 14:30.1.

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

December 2, 1997

Mr. Richard A. Sharpstein
1710 Miami Center
201 South Biscayne Boulevard
Miami, FL 33131

Re: Miguel Velez
v. Kelly Ward, Warden
Application No. A-391

Dear Mr. Sharpstein:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Scalia, who on December 2, 1997, extended the time to and including February 9, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Jeffrey D. Atkins
Jeffrey D. Atkins
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

Mr. Richard A. Sharpstein
1710 Miami Center
201 South Biscayne Boulevard
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Ms. Monisa Thompson
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United States Court of Appeals for
the Fifth Circuit
600 Camp Street, Room 100
New Orleans, LA 70130

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 96-31290

MIGUEL VELEZ,

Appellant,

v.

RICHARD STALDER,

Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA

APPELLANT'S BRIEF REGARDING CERTIFICATE OF APPEALABILITY

(Filed June 20, 1997)

Richard A. Sharpstein
Ada Manzano Avallone
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Suite 2380, Miami Center
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No. 96-31290, Velez V. Richard Stalder

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are mad [sic] in order that the judges of this court may evaluate possible disqualification or recusal.

1. Miguel Velez, appellant
2. Richard A. Sharpstein, counsel for appellant
3. Ada M. Avallone, counsel for appellant
4. Sharpstein & Sharpstein, P.A., counsel for appellant
5. Premila Burns, counsel for appellee
6. Monisa L. Thompson, counsel for appellee
7. E. Sue Bernie, counsel for appellee
8. Douglas Paul Moreau, counsel for appellee
9. Office of the District Attorney, Baton Rouge, La., counsel for appellee
10. Richard Stalder, appellee
11. Luis Carlos Quintero-Cruz, co-defendant at trial
12. Arthur Berger, counsel for co-defendant Luis Carlos Quintero-Cruz
13. Judge John M. Shaw, Western District of Louisiana
14. Thomas Lorenzi, co-counsel for appellant

/s/ Ada M. Avallone
Ada Manzano Avallone, Esq.
Attorney of Record for Appellant

STATEMENT REGARDING ORAL ARGUMENT

The issue raised in this brief concerns the standards for the granting of a certificate of appealability in a habeas corpus case, where the district court denied the appellant's request. In Miguel Velez's case, the district court held a one day hearing regarding the purposeful use of peremptory challenges to exclude African-American's from the jury in violation of *Batson v. Kentucky,* 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986). Velez submits that the district court applied the wrong standard in evaluating his *Batson* claim and denying his request for a certificate of appealability. Oral argument would assist this Court in determining whether a certificate of appealability should be granted.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §2253(c)(2) and Fed. R. App. P. 22.

STATEMENT OF THE ISSUES

Whether the district court erred in denying Velez's request for a certificate of appealability?

STATEMENT OF THE CASE

I. Course of Proceedings Below

A jury convicted Velez of first degree murder in the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana. (R.1) The trial court sentenced Velez to life imprisonment without parole. (R.1) Velez appealed his conviction to the Third Circuit Court of Appeal. (R.1) The Third Circuit affirmed Velez's conviction. *State v. Velez,* 588 So.2d 116 (La. 3d Cir. 1991). (R.1) Velez applied for a writ of review to the Louisiana Supreme Court, but that was denied. *State v. Velez,* 592 So.2d 408 (La. 1992). (R.1) Next, Velez petitioned the United States Supreme Court for a writ of certiorari. (R.1) Velez's application was denied. *Quintero-Cruz v. Louisiana,* 505 U.S. 1220, 112 S.Ct. 3031, 120 L.Ed.2d 901 (1992). (R.1)

Velez petitioned the District Court for the Western District of Louisiana for a writ of habeas corpus pursuant to 28 U.S.C. §2254. (R.1, 17) Velez raised three issues as follows:

1. The denial of equal protection guaranteed under the Fourteenth Amendment to the United States Constitution by the discriminatory use pf [sic] peremptory challenges under *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986);

2. The denial of due process guaranteed under the Fourteenth Amendment to the United States Constitution by the suppression of evidence favorable to Velez and material to the issue of guilt, by the prosecution; and

3. The denial of the right to a fair and impartial jury under the Sixth Amendment to the United States Constitution as evidenced by a jury note which was sent to the trial court. (R.1, 17)

After extensive briefing, the district court held an evidentiary hearing solely on the *Batson*-issue. (R.174, 180, 196) At the time of the hearing, the district court requested supplemental briefing on several issues that had arisen. (R.201) A supplemental memorandum of law was filed. (R.208, 210) Magistrate Judge Mildred Methvin filed a twenty-nine pages report and recommendation urging that Velez's claims were without merit and that the petition be denied. (R.212) Velez filed specific objections to the magistrate's report and recommendations. (R.308) However, the district court entered a judgment in accordance with the report and recommendation. (R.312)

Velez filed a timely notice of appeal and applied for a certificate of appealability. The district court denied the certificate of appealability holding that:

1. Velez's case was without merit;

2. That the record failed to support a finding of purposeful racial discrimination in violation of *Batson*;

3. That as a matter of law, Velez failed to establish a *Brady* violation;

4. That absent outside influence, a Louisiana jury's verdict may not be impeached; and

5. That Velez's appeal was frivolous.[1] (R.319)

Velez proceeded to request a certificate of appealability from this Court. The record on appeal was filed with this Court in January of 1997. Undersigned counsel contacted the clerk's office for the Fifth Circuit in May of this year. Several days later, Velez was ordered to file a brief on the issue of the certificate of appealability. This brief is filed in conformity with this Court's order.

II. Statement of Facts

A. VOIR DIRE AND THE BATSON ISSUE

Velez was indicted in the Nineteenth Judicial District Court, East Baton Rouge Parish, Louisiana on charges of first degree murder for the contract killing of government informant, Barry Seal. (R.212-[2-3]) The trial was transferred to Lake Charles due to extensive pretrial publicity. (R.212-[2-3]) Jury selection took three weeks.

Approximately three hundred potential jurors were examined during voir dire. (R.212-9) The prosecutor, Premila Burns, used fifteen peremptory challenges against black prospective jurors. (R.212-[9, 14, 18]) The prosecutor exercised ten peremptory challenges against blacks before finally accepting one. (R.212-9) Then, five more black jurors in a row were stricken before the State accepted black prospective juror Shaw. The twelve person jury finally sworn included only one black. (R.212-9) The defense lodged contemporaneous objections to the prosecutor's exercise of peremptory challenges against the blacks; however, the trial court ruled that the defendants lacked standing to object since they were hispanic and not black.[2] (R.212-[8-20])

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[1] This Court should note that the district court considered Velez's petition for writ of habeas corpus in conjunction with the co-defendant, Quintero-Cruz's petition. The evidentiary hearing held by the district court addressed the *Batson* issue raised by both Velez and Quintero-Cruz. And, although the district court also denied Quintero-Cruz's request for a certificate of appealability, the district court did not find the request or the issues raised to be frivolous.

At the evidentiary hearing held by the district court, the prosecutor Premila Burns explained her use of peremptory challenges to excuse blacks. (R.201) Generally, the prosecutor argued that she had used her peremptory challenges to exclude blacks who had a weak position concerning the death penalty. (R.201) However, that explanation fails to hold true for at least two prospective black jurors which the State excused, Charles and Cormier, neither of which expressed any reservations about the death penalty.[3] (R.201)

---

[2] While Velez's conviction was on appeal to the Third Circuit, the United States Supreme Court decided *Powers v. Ohio*, 499 U.S. 400, 115 S.Ct. 1364, 113 L.Ed.2d 411 (1991), which held that the discriminatory use of peremptory challenges jeopardizes the integrity and fairness of the judicial process, an interest which any defendant has standing to raise via a *Batson* objection.

[3] The prosecutor informed the district court during its evidentiary hearing that it had excused Charles because she answered questions simply "yes" or "no" and thus seemed unresponsive. Also, defense counsel didn't question Charles. Lastly, Charles questioned the prosecutor's desire to impose the death penalty on a co-defendant who had not been present at the time of the crime. Incidentally, the co-defendant at issue,

The prosecutor used its first peremptory challenge against black prospective juror Rios. According to the prosecutor, she excused Rios because "not intelligent per transcript," meaning the voir dire transcripts.[4] The prosecutor explained:

> . . . And when I say the transcript that, would be the colloquy that had gone on between counsel and both for the State as well as for the defense; and in particular when I was preparing for the oral argument in this case, I noted specifically a series of questions and answers that were posted to this particular juror, not just by the State but mainly in response to questioning by Mr. Moore on behalf of Mr. Cruz. And the man would answer in language that just was not responsive to the questions being asked specifically; and the record, the supplemental record at Volume 11, starting at [p]age 2913 bears out the fact that he was asked the question: . . .

(R.201-[40-41]) Apparently, the prosecutor's notes regarding her use of a peremptory challenge on juror Rios were

---

Vazquez, was convicted of first degree murder and the appellate court reversed his conviction indicating that the evidence was only sufficient to sustain a second degree murder conviction. Apparently, juror Charles' asked a legitimate question. The prosecutor also informed the district court that she had excused Charles because he would need to have stitches removed during the course of the trial and because he was "obviously homosexual." (R.201-[52-53])

[4] At the evidentiary hearing the prosecutor submitted into evidence a list of her peremptory challenges which noted the juror's name, his or her race and sex, as well as a brief description of the reason for the exercise of the peremptory challenge. (R.201-[38-40])

made after the fact, since the prosecutor revealed herself to be quite articulate[5] and the word "transcript" by her own concession refers to the voir dire transcript prepared for appellate purposes. (R.201-[40-41]) The prosecutor used its third peremptory challenge to excuse potential juror Moton, a black female. The prosecutor read a portion of the voir dire transcript which revealed that Moton responded that she would be afraid to vote the defendants guilty because of her fears of what they might do if they got out of jail. (R.201-42)

The prosecutor exercised her eighth peremptory challenge against potential juror Simmons, a black female who expressed a weak position regarding the death penalty. (R.201-45) The State exercised its ninth peremptory challenge against Broussard, a black male, also because of his weak position regarding the death penalty. (R.201-[48-49])

The prosecutor exercised her tenth peremptory challenge against potential juror, Griffin, a black male. With this juror, the prosecutor had made pencil markings, in preparing for the appellate process, indicating that she had excused this juror because he had a weak position concerning the death penalty. (R.201-50) The prosecutor exercised her sixteenth challenge against potential juror, Pierfax, a black male because he had been fired from a State job for sleeping on the job. (R.201-51)

Next the state excused potential juror, Edwards, a black female who had a weak position concerning the death penalty. (R.201-51) Rosa Charles was the next black potential juror that the prosecutor struck. According to the prosecutor she was struck because she gave one word answers, she had a weak position on the death penalty[6] and because defense counsel failed to question her. (R.201-[52-53]) However, cross-examination revealed that Charles answered the trial court's questions thoroughly and that the prosecutor asked questions that only required yes or no answers. (R.201-[113-116]) Additionally, during cross-examination it was revealed that defense counsel didn't question any of the three jurors that were interviewed at the same time as Charles. (R.201-119)

---

[5] *See*, (R.201-41).

The prosecutor exercised its twenty third peremptory challenge against potential juror Bellard, a black female who allegedly had a weak position concerning the death penalty. (R.201-54) Next, the prosecutor struck potential juror Dugas, a black female who was also weak on the death penalty. (R.201-54) The prosecutor struck potential juror Batcham, a black male due to his weak position concerning the death penalty. (R.201-55)

Next, the prosecutor excused a black male, potential juror Antoine who initially said no to the death penalty. (R.201-56) Hawkins was the next black male excused by the prosecutor because he was weak on the collateral defendants. (R.201-[56-57]) Then the prosecutor exercised a peremptory challenge against Cormier, a black creole man. (R.201-58) This juror was excused by the prosecutor primarily because he was "obviously" homosexual. (R.201-[58-59])

---

[6] Unlike the other jurors, the prosecutor failed to cite the trial court to any specific question or answer, or even a record page number reflecting that potential juror Charles had a weak position on the death penalty. (R.201-53)

The prosecutor exercised her thirty fourth peremptory challenge against potential juror Fontenot, a black female who was a security guard and had an unemployed husband. According to the prosecutor, the juror was "sour" and she just didn't like her. (R.201-57) The prosecutor exercised her last peremptory strike against a black male, Dellafosse, who initially indicated he was opposed to the death penalty. (R.201-59)

The prosecutor also emphasized that it had exercised more peremptory challenges against white potential jurors than black potential jurors with twenty-one peremptory challenges exercised against whites and only fifteen exercised against blacks. (R.201) These numbers however disregard important facts and must be taken in context. The prosecution had thirty-six peremptory challenges which it had to exercise against a jury pool of "over three hundred" potential jurors. (R.212-9) Of the three hundred prospective jurors we know that seventeen were black and fifteen of the seventeen were excused due to the prosecutor's exercise of peremptory challenges. (R.212-9) The only hispanic juror was excused for cause. That leaves two hundred eighty two presumably white jurors. Thus, the prosecutor's exercise of twenty-one peremptory challenges against white prospective jurors from a panel of two hundred eighty two reveals that the prosecutor used her peremptory challenges against whites ($^{21}/_{282}$ or 7%) in a much smaller percentage than her use of peremptory challenges against blacks ($^{15}/_{17}$ or 88%).

Despite her assertion that her peremptory strikes were not racially motivated, the prosecutor admitted that experience had taught her that most blacks called for jury service are opposed to the death penalty. (R.201-79) Additionally, the prosecutor admitted to using the term "nigger" but the district court sustained an objection and did not allow counsel to inquire as to the context in which the prosecutor uses the term. (R.201-124)

B. THE BRADY MATERIAL

For purposes of the issue presently before this Court, whether Velez should be granted a certificate of appealability, Velez submits that the facts pertinent to the *Brady* material issue are not pertinent. Should this Court grant Velez a certificate of appealability, Velez will fully brief all the issues presented in his petition for writ of habeas corpus.

C. THE JURY NOTES

During the penalty phase of Velez's trial, two jurors sent the trial court a note which read as follows:

> Your Honor,
>
> I made a decision of 2nd degree murder but was told it had to be 1st degree murder because of money involved. What can I do? I feel I was coerced. I'm having a hard time living with 1st degree. Please tell me something.
>
> W. Hartnell

And I'm not the only one.

I, Edna Shaw, feel I was coerced in making a decision of 1st degree murder than [sic] I can not live with.

Edna Shaw

(R.212-[24-25])

Defense counsel moved to:

(1) repoll the jury;

(2) conduct an evidentiary hearing; or

(3) grant a mistrial and new trial.

(R.212-25) The trial court denied all three requests holding that the note was probably prompted by the penalty phase testimony of a co-defendant's mother. No evidentiary hearing was held. (R.212-25)[7]

Throughout these proceedings Velez has asserted that the trial court's refusal to inquire whether the jurors were coerced by an outside influence violated his sixth amendment right to a fair and impartial jury. Velez has argued that a simple question, "Were you coerced by someone outside the jury?" would have resolved the issue with definitiveness. If the answer was "no" nothing further needed to be done. If the answer was "yes" then a full evidentiary hearing had to be granted. The district court considering this issue held that "the defendants have been afforded a full and fair hearing on this issue. . . . " The district court also held that the state courts' findings of fact were entitled to a presumption of correctness. (R.212-.26)

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[7] It is interesting to note that the Magistrate's Report and Recommendations cites that the Third Circuit Court of Appeals in Louisiana fully analyzed this issue. According to the Magistrate's Report and Recommendation, the "Third Circuit found no evidence of extraneous influence or coercion by a third person." (R.212-26) The appellate court could not find evidence of external coercion because it is not the responsibility of the appellate court to engage in fact finding. Appellate courts simply review the record on appeal and Velez's argument has always been that he was denied the opportunity to develop a record because the trial court refused to ask whether an outside source had influenced the two jurors who sent the note.

SUMMARY OF THE ARGUMENT

Pursuant to section 102 of the Antiterrorism and Effective Death Penalty Act of 1996, and *Drinkard v. Johnson,* 97 F.3d 751 (5th Cir. 1996), Velez has made a substantial showing of the denial of a constitutional right. The United States Supreme Court has held that a "substantial showing" requires the applicant to:

> demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. [*Barefoot v. Estelle,* 463 U.S. 880, 893, n.4, 103 S.Ct. 3383, 3394, n.4.] (internal citations and quotations omitted)

Drinkard v. Johnson, 97 F.3d at 755. Velez has done just that. At the very least, the *Batson* issue and the jury note issue raised by Velez are:

1. debatable among jurists of reason;

2. a court could resolve the issues in a different manner;

3. and/or the questions raised are adequate and deserve encouragement to proceed further.

The State used its peremptory challenges to excuse fifteen out of seventeen black potential jurors that were questioned during voir dire. The prosecutor admitted that she believes most blacks do not favor the death penalty. The prosecutor also admitted to using the racial epithet, "nigger." At the very least, the *Batson* issue is debatable among jurists of reason and deserves encouragement to proceed further.

And, an evidentiary hearing has never been held to determine who coerced two jurors that sent the trial court a note indicating that they had been coerced into rendering guilty verdicts for first degree murder. Article 606(B) of the Louisiana Code of Evidence specifically provides that a juror may testify on the question of whether any outside source was improperly brought to the jury's attention. Velez has never been granted an evidentiary hearing and his sixth amendment right to a fair and impartial jury has been denied through the court's inaction.

ARGUMENT

I. THE APPLICABLE STANDARDS OF REVIEW

The new standards for review of habeas corpus claims are codified at 28 U.S.C. §2254(d), which provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Subsection (d)(1) provides the standard of review for questions of law and mixed questions of law and fact. Subsection (d)(2) provides the standard of review for questions of fact. *Drinkard*, 97 F.3d at 767.

II. THE BATSON ISSUE IS DEBATABLE AMONG JURISTS OF REASON AND DESERVES ENCOURAGEMENT TO PROCEED FURTHER

Section 2253 of Title 28 provides in pertinent part as follows:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a **substantial showing of the denial of a constitutional right.**
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue

> or issues satisfy the showing required by paragraph (2).

(Emphasis added)

This Court addressed the issue raised by the new requirement of a certificate of appealability and the appropriate standards of review in *Drinkard v. Johnson,* 97 F.3d 751 (5th Cir. 1996) (where this Court granted the certificate of appealability but affirmed the conviction on the merits.) This Court noted that Section 2253(c) now codifies the standard articulated by the Supreme Court in *Barefoot v. Estelle,* 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) which provided as follows.

> A "substantial showing" requires the applicant to "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues (in a different manner); or that the questions are adequate to deserve encouragement to proceed further." *Id.* At 893 n.4, 103 S.Ct. at 3394 n.4 (internal citations and quotation marks omitted).

Drinkard, 97 F.3d at 755. *See also, Baldree v. Johnson,* 99 F.3d 654 (5th Cir. 1996) (same).

Thus, 28 U.S.C. §2253(c)(2) does not require that the district court find that a substantial likelihood of success be present but merely that the issue is debatable among jurists of reason. The facts revealed at the evidentiary hearing are as follows:

(1) the prosecutor admitted a bias against blacks in death penalty cases stating that on the whole, blacks do not favor the death penalty[8];

(2) the prosecutor admitted using the racial epithet "nigger" in referring to blacks; and

(3) the prosecutor peremptorily excused fifteen of the seventeen blacks questioned during voir dire, who had already been death qualified by the trial court. (The prosecutor used her peremptory challenges to excuse 88% of the blacks who had been death qualified by the trial court.)

Certainly the Batson issue was not frivolous. And the issue deserves encouragement to proceed further. *See, Mata v. Johnson*, 99 F.3d 1261 (5th Cir. 1996) where this Court granted a certificate of appealability but affirmed the denial of a writ of habeas corpus where the prosecution and the defense agreed to exclude all the black prospective jurors.) This Court has recognized that the prohibition under *Batson* on the use of race as a basis for peremptory strikes was designed not only to protect individual defendants from discrimination in selection of jurors, but also to protect the rights of potential jurors and to insure continued public confidence in the judicial system. *Mata,* 99 F.3d at 1269. This Court should grant Velez a certificate of appealability to allow a full briefing of the *Batson* issue.

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[8] An assumption of partiality based on race violates the equal protection clause and warrants a new trial. *United States v. Huey*, 76 F.3d 638 (5th Cir. 1996) (A co-defendant used her peremptory challenges to exclude all African-American veniremen believing that they were incapable of being impartial due to the racially offensive content of a tape recording.) In addition to harming individual defendants and prospective jurors, racial discrimination in the selection of jurors impugns the integrity of the judicial system and the community at large. "Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of a group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice – our citizens' confidence in it." *United States v. Huey*, 76 F.3d 638, 641 (5th Cir. 1996), quoting, *Georgia v. McCollum*, 505 U.S. 42, 59, 112 S.Ct. 2348, 2359, 120 L.Ed.2d 33 (1992).

III. THE JURY NOTE ISSUE IS DEBATABLE AMONG JURISTS OF REASON AND COULD BE RESOLVED IN A DIFFERENT MANNER.

Article 606(b) of the Louisiana Code of Evidence provides in pertinent part:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, **except that a juror may testify on the question whether any outside influence was improperly brought to the jury's attention. . . .**

(Emphasis added) At trial, Velez cited the court to *Durr v. Cook,* 589 F.2d 891 (5th Cir. 1979) (which held that a state defendant is entitled to a panel of impartial and indifferent jurors.)

In cases of extrajudicial communications by a juror, a trial court is required to conduct a hearing to determine the circumstances of the communication, its impact on the juror and whether prejudice resulted. *United States v. Denman,* 100 F.3d 399 (5th Cir. 1996) (where the trial court did hold an evidentiary hearing.) *See also, Lawson v. Borg,* 60 F.3d 608 (9th Cir. 1995) (where the ninth circuit held that allegations in a state murder trial warranted an evidentiary hearing on federal habeas corpus review given that the state court failed to provide a full and fair hearing.)

The United States Supreme Court has held that if even one juror is unduly biased, the defendant is denied his constitutional right to an impartial jury. In a criminal case, any private communication, contact or tampering with a juror during a trial is presumptively prejudicial, *Remmer v. United States,* 347 U.S. 227 (1954) (During trial an individual communicated with one juror regarding the verdict, so the Supreme Court remanded to the district court for a hearing to determine whether the incident harmed the defendant.)

In the instant case, the trial court determined that the two jurors who expressed that they were coerced were just having second thoughts about their first degree murder verdicts, without holding any form of a hearing. In light of the fact that the trial court received a second jury note from two other jurors and that the note requested a private meeting with the judge, it was obvious that the jurors were experiencing some difficulties and at the very least the trial court should have inquired whether an outside source was exerting influence over the jury. Furthermore, the district court which heard Velez's petition for writ of habeas corpus also refused to grant an evidentiary hearing.

The trial court's actions deprived Velez of his sixth amendment right to a fair and impartial jury. The trial court's failure to inquire whether jurors had been coerced by an outside source resulted in a decision that was based on an unreasonable determination of facts in light of the evidence. This jury note issue is debatable among jurists of reason and can be resolved in a different manner. This Court should grant Velez a certificate of appealability to allow a full briefing of this issue.

CONCLUSION

Based on the foregoing facts and law, appellant, Miguel Velez requests that this court grant him a certificate of appealability.

Respectfully Submitted,

/s/ Ada M. Avallone
RIHCARD [sic] A. SHARPSTEIN, Esq.
ADA MANZANO AVALLONE, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was furnished by United States mail on this 9th day of June, 1997, to the following:

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UNITED STATES CIRCUIT COURT OF APPEALS
FIFTH CIRCUIT

MIGUEL VELEZ,

VERSUS CASE NO. 96-31290

RICHARD STALDER, WARDEN,
WADE CORRECTIONAL
CENTER.

______________________________/

REQUEST FOR CERTIFICATE OF APPEALABILITY

(Filed Dec. 19, 1996)

Pursuant to Rule 22, Federal Rules of Appellate Procedure, and 28 U.S.C. § 2253(c)(2), the petitioner, Miguel Velez, (Velez) hereby requests a certificate of appealability and as grounds therefor asserts as follows:

1. Pursuant to Section 102 of the Antiterrorism and Effective Death Penalty Act of 1996, and *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996), Velez has made a substantial showing of the denial of a constitutional right.

2. Velez's Petition For Writ of Habeas Corpus raised three issues as follows:

a. The denial of equal protection guaranteed under the Fourteenth Amendment to the United States Constitution by the discriminatory use pf [sic] peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986);

b. The denial of due process guaranteed under the Fourteenth Amendment to the United States Constitution by the suppression of evidence favorable to Velez and material to the issue of guilt, by the prosecution; and

c. The denial of the right to a fair and impartial jury under the Sixth Amendment to the United States Constitution as evidenced by a jury note which was sent to the trial court.

3. The District Court granted an evidentiary hearing.

4. The United States Supreme Court has held that a "substantial showing" requires the applicant to:

> demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. [*Barefoot v. Estelle,* 463 U.S. 880, 893, n.4, 103 S.Ct. 3383, 3394, n.4.] (internal citations and quotations omitted)

Drinkard v. Johnson, 97 F.3d at 755. Velez has done just that. The issues raised by Velez are debatable among jurists of reason and/or the questions raised are adequate and deserve encouragement to proceed further.

5. The Magistrate's Report and Recommendation notes that ten African-Americans were struck from the jury before the prosecution accepted one. A total of fifteen African-Americans were struck by the prosecution and only one African-American juror was selected to sit throughout the trial. At the evidentiary hearing, the prosecution testified that most of the African-Americans were stricken because of their weak position as to the death penalty. Specifically, the prosecution testified that one African-American juror was stricken not because he was African-American, but because he was "obviously homosexual". Despite these facts, the District Court found that

there was no pattern of discrimination evidenced by the prosecution's exercise of peremptory challenges.

6. With regards to the *Brady* issue, there is no dispute that the material requested by Velez, prior inconsistent statements, plea agreements and medical histories, existed. The location of such items was known to the prosecution. All the material was in the possession of the Department of Justice, which assisted the prosecution throughout the trial. The two key prosecution witnesses were federal informants who had negotiated plea agreements with the Department of Justice and testified in the state case pursuant to federal plea agreements. The two witnesses were the only two witnesses who testified to the "murder for hire" required for the first degree murder conviction.

7. Lastly, with regard to the denial of the Sixth Amendment right to a fair and impartial jury, the Louisiana court of appeals found no evidence of extraneous influences on the jury based on the record on appeal. That is the very issue about which Velez complains. The trial court failed to ask one simple question which would have settled the matter one way or another. All the trial court had to ask was "Did someone, other than another juror, coerce you into rendering a first degree murder verdict?" If the jurors answered "no" then nothing further would have to be asked or done. If the jurors answered "yes" then there was jury tampering and further evidence would have been necessary.

8. Velez requested a certificate of appealability from the District Court. The district court denied the request

(Exhibit A) erroneously finding that Velez is a pauper[1] and that the petitioner's appeal is frivolous, despite the fact that it granted an evidentiary hearing on the *Batson* issue.

Wherefore, Miguel Velez requests that this Court grant him a certificate of appealability where his petition for writ of habeas corpus makes a substantial showing of the denial of constitutional rights.

Respectfully submitted,

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[1] This office has always represented Miguel Velez, who has never been declared indigent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REQUEST FOR CERTIFICATE OF APPEALABILITY was furnished by United States Mail on this 7th day of January, 1997, to the following:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

MIGUEL VELEZ, VERSUS KELLY WARD, WARDEN, WADE CORRECTIONAL CENTER.	CIVIL ACTION NO. 94-0120 JUDGE SHAW MAGISTRATE JUDGE METHVIN

PETITIONER, MIGUEL VELEZ'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATIONS

(Filed Sept. 27, 1996)

Pursuant to this Court's September 10, 1996, order, the Petitioner, Miguel Velez, (Velez) hereby files his objections to the Magistrate's Report and Recommendations.

1. The Magistrate Judge has filed a Report and Recommendation urging that Petitioners' Quintero-Cruz and Velez's Petitions For Writ of Habeas Corpus be denied. In order to avoid redundancy, Velez adopts Luis Carlos Quintero-Cruz's Objections as they pertain to him. Specifically, Velez adopts Quintero-Cruz's objections as they pertain to the *Batson* issue.

2. With regards to the *Brady* issue, Velez asserts that the Magistrate's Report and Recommendation overlooks the following facts:

a. The State may not choose to be ignorant of *Brady* material that is specifically requested by the defendants;

b. The requested *Brady* material was accessible to the State, was favorable to petitioners, and was material to the petitioners' guilt since it affected the credibility of the only two witnesses who testified regarding the contract killing required for a first degree murder conviction, and jurors expressed doubts about the first degree murder conviction;

c. The plea agreements requested existed, were in the possession of the Department of Justice which was assisting the State in its prosecution of the petitioners and were accessible to the State by simply requesting the complete plea agreements from the Department of Justice;

d. The plea agreements were critical to an assessment of the credibility of the only two State witnesses who testified regarding the "contract killing," an essential elements of the first degree murder charge;

e. Similarly, the State had access to Uribe-Munera's complete psychological history which was in the possession of the Department of Justice, and such information was critical to an assessment of the credibility of one of the two witnesses who provided evidence of first degree murder;

f. Uribe-Munera's prior inconsistent statement's were also in the possession of the Department of Justice and the summary of the inconsistent statements provided by the State was an individual's interpretation of actual statements, to which petitioners were entitled; and

g. Last, but not least, material that is accessible to the State, must be provided pursuant to the dictates of Brady. *Calley v. Callaway,* 519 F.2d 184, 223 (5th Cir. 1975).

3. Regarding the jury note issue, there is nothing more than an appellate court's assumption that jurors who expressed concern regarding their verdict were not influenced by outside sources since:

a. The jurors' note did not indicate who told them they had to convict for first degree murder since money was involved; and

b. Even the magistrate notes that the State argues that "the juror notes were **probably prompted** because the jury had recently heard the penalty-phase testimony of Mrs. Vasquez, . . . " such that it is clear that no one knows whether the jurors were influenced by an outside source;

c. The magistrate notes that the appellate court found no evidence of an extraneous outside source influencing the jury, but how could the appellate court make such a finding when all it had before it was the record on appeal which merely contained the jurors' note and an assumption by the trial court that other jurors coerced the two jurors at issue;

d. The jurors's note did not indicate that other jury members had exerted pressure on them to acquiesce in the first degree murder conviction;

e. Two other jurors requested a meeting with the trial judge to discuss a problem;

f. A simple question, "Did anyone outside the jury influence you in your decision to convict for first degree murder?" would have clarified the remaining ambiguities so that we could know what definitively prompted the notes rather than what "probably" prompted the note; and

g. The jurors' note indicated an "outside influence" as much as it indicated an influence by other jurors such that the trial court's decision was an arbitrary one, not entitled to a presumption of correctness.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Objections to the Magistrate's Report and Recommendations was furnished by United States Mail on this ___ day of September, 1996, to the following:

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